72-778

FILE COPY

NOV 27 1972

MICHAEL RODAK, JR., CLERK

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

KATHLEEN K. WILKIN,
Petitioner,

vs.

SUNBEAM CORPORATION,
Respondent.

72-778

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EVERETT C. FETTIS
One Twenty Building
Wichita, Kansas 67202
and
ROBERT C. ALLAN
1002 West Douglas
Wichita, Kansas 67203
and
JOHN H. WIDDOWSON
306 Bitting Building
Wichita, Kansas 67202
and
DALE M. STUCKY*
1600 Wichita Plaza Building
P. O. Box 997
Wichita, Kansas 67202
Attorneys for Petitioner

*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Court Opinions Below 1

Jurisdiction of the Court and Grounds Urged for Allowance of the Writ 2

The Question Presented for Review 3

Statement of the Case and Facts 4

Argument 13

- Credibility 14
- Relevance and Materiality 16
- Novelty 17
- The Law 20

Conclusion 22

Appendix—

- Opinion, United States Court of Appeals, Tenth Circuit A1
- Opinion, United States District Court, District of Kansas, January 5, 1971 ..... A7
- Memorandum and Order on Motion for Relief from Judgment Under Rule 60(b), F.R.C.P., July 14, 1970 ..... A10
- Suppressed Documents A25-A33

Table of Authorities

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 ..... 2, 20

28 U.S.C. Section 1254(1) 2

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KATHLEEN K. WILKIN,
Petitioner,

vs.

SUNBEAM CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COURT OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced herein in the appendix, hereinafter, page A1.

The District Court delivered two unreported opinions, dated July 14, 1970 (R, V 5, pp. 836-847) and January 5, 1971 (R, V 5, pp. 852-853). They are reproduced herein in the appendix, pages A7 and A10.

JURISDICTION OF THE COURT AND GROUNDS URGED FOR ALLOWANCE OF THE WRIT

The Petitioner invokes the jurisdiction of this Court, and urges the following grounds for allowance of the writ:

The Court of Appeals dated and filed its judgment August 30, 1972;

A petition for rehearing in the case was denied October 2, 1972;

This Court has jurisdiction to review the judgment under the provisions of Section 1254 of the Judicial Code, 28 U.S.C. Section 1254(1);

1. The decisions of the Court of Appeals and District Court do not follow the decision of this honorable Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

2. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The Court of Appeals so far sanctioned departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision.

4. The case is one wherein the issues are important to the bar and public with respect to the conduct of attorneys and the sanctity of the judicial system.

5. The decisions of the Court of Appeals and District Court reflect a misunderstanding of the applicable law.

6. The decisions of the Court of Appeals and District Court reflect a misunderstanding of the essential facts which entitle petitioner to relief.

7. The decisions of the Court of Appeals and District Court reflect a misunderstanding of the import of indisputable facts.

8. The decisions of the Court of Appeals and District Court with respect to fraud, credibility, relevance and materiality, and trade secret are clearly not supported by the indisputable facts.

9. The decisions of the Court of Appeals and District Court give no reasons or analysis of the indisputable facts with respect to their findings on fraud, credibility, relevance and materiality, and trade secret.

10. The District Court abused its discretion.

11. The Court of Appeals abnegated its responsibility in refusing to review credibility.

12. The Court of Appeals and District Court decisions erred in deciding that petitioner's disclosure was incapable of being novel to respondent.

13. The indisputable facts as represented by the acts and conduct of respondent show that petitioner's disclosure to respondent was novel to respondent in 1957.

THE QUESTION PRESENTED FOR REVIEW

Whether a prior judgment should be set aside on the basis of misconduct of attorneys of record, when said misconduct comprises suppression, fraud, and false oaths and testimony by said attorneys, and said misconduct is shown by indisputable facts established by documentary evidence and said attorney's own statements.

STATEMENT OF THE CASE AND FACTS

This petition seeks review of the 10th Circuit Court of Appeals decision dated August 30, 1972, and reproduced herein at appendix, page A1. A petition for rehearing was denied on October 2, 1972.

The Court of Appeals decision affirmed decisions by the Kansas District Court dated July 14, 1970, and January 5, 1971, and reproduced herein at appendix, pages A7 and A10. The decisions denied petitioner's motion to set aside a prior judgment on the ground that it was procured by the misconduct of respondent's attorneys of record, and to grant a new trial.

To understand the attorney misconduct it is necessary to consider eight (8) documents which were suppressed by respondent's attorneys. These documents (R, V 5, pp. 768-776) are dated as follows:

August 12, 1958
September 4, 1958
September 29, 1958
October 27, 1958
November 10, 1958
November 11, 1958
November 21, 1958
November 26, 1958

and all except the second one are reproduced herein at appendix, pages A25-A33. To this date respondent's attorneys say they can't find the second one, but at least its date is known since it is referred to at the outset of the third one.

The prior judgment which petitioner seeks to have set aside was obtained in petitioner's prior action against re-

spondent for misappropriation. Petitioner Mrs. Kathleen K. Wilkin is a school teacher and housewife. In 1957 Mr. Wilkin demonstrated his wife's novel electric cooking appliance, which makes toasted, filled and sealed sandwiches; and showed her patent application to Mr. Neil M. Rose, an attorney in respondent's patent department (R, V 9, p. 23).

Respondent advised petitioner that it was not interested in her device for the stated reason that it would be too expensive to promote. Before returning petitioner's patent application respondent made a copy of same for its files. Neither Mr. nor Mrs. Wilkin signed any written waiver or release of her common law rights.

Then unknown to petitioner, in 1958 a Mr. L. J. Funke made a similar disclosure to respondent. Mr. Funke also had a model and pending patent application (R, V 5, pp. 651-652). Mr. George R. Clark, the manager of respondent's patent department and one of respondent's attorneys of record handled the Funke outside submit (R, V 5, p. 449) and had Mr. Funke sign a written waiver or release of his common law rights, see suppressed document dated August 12, 1958.

At the time respondent was considering Mr. Funke's disclosure respondent engaged the services of a Mr. Ulmont O. Cumming, an investigator, to spy on the Wilkins, see suppressed document dated September 29, 1958. In contacting them Mr. Cumming used the fictitious name of Robert Laird. He said he might be interested in purchasing petitioner's rights, and wanted to know the status of her patent application and whether or not she had commercialized her device. Innocently assuming that his inquiry was one of genuine interest, the requested information was given, which Mr. Cumming then reported to respondent. Petitioner did not then know that respondent,

Sunbeam Corporation, was the real party in interest behind this inquiry.

Mr. R. P. Gwinn, respondent's President, and Mr. Ivar Jepson, respondent's Vice-President for Research and Development, wanted to pay Mr. Funke for his disclosure, see suppressed documents dated October 27, 1958, and November 10, 1958. However, Mr. Clark advised them not to do so since Mr. Funke was not first. This reason was also given to Mr. Funke and his attorney Mr. Lee, see suppressed documents dated November 11, 1958, and November 26, 1958. In writing to them on November 26, 1958, Mr. Clark made his point by sending them a reproduction of the patent drawings of the copy of Mrs. Wilkin's patent drawings which respondent had earlier retained in its files. The above was also unknown to petitioner.

In 1961 respondent placed a similar cooking device, the Sunbeam "Party Grill", on the market. It was advertised as being a revolutionary cooking appliance. Seeing the similarities thereof with her earlier disclosure to respondent, petitioner promptly reminded respondent of her 1957 disclosure to respondent. Obtaining no satisfaction from respondent, on June 28, 1962, petitioner filed her action against respondent for misappropriation.

Just prior thereto, on May 14, 1962, respondent Sunbeam Corporation filed a patent application on the Sunbeam Party Grill cooking appliance, Serial No. 194,468. Mr. Clark and Mr. Walther E. Wyss, respondent's Chicago counsel, were the named attorneys for said Party Grill patent application. One of the named inventors was Mr. Jepson, respondent's Vice-President for Research and Development. Respondent calls Mr. Jepson "The Thomas Edison of the household appliance industry".

The Sunbeam Party Grill patent application was a broad one. It reads on Mrs. Wilkin's disclosure to respond-

ent, and exemplary patent Claim No. 7 thereof is as follows:

> "7. A heating device comprising an upper and lower heating unit, means for hingedly relating said units, a first elongated handle secured to and projecting from the upper heating unit, a second elongated handle secured to and projecting from the lower heating unit, said handles having their longitudinal axes disposed in spaced parallel relationship when said heating units are in closed position with the first handle overlying said second handle, and latching means at the free ends of said handles for latching said units in closed position."

The cause of action for misappropriation was tried before a jury in 1965. However, during pretrial there were successive acts of misconduct by respondent's attorneys of record which comprise defilement of judicial process. Chronologically these acts of misconduct were as follows:

1. Respondent's willfully incomplete answer to petitioner's Interrogatory No. 1.

2. Respondent's false answer to petitioner's Interrogatory No. 36.

3. The October 14, 1963, false deposition testimony of Mr. George R. Clark.

4. Respondent's willfully incomplete answer to petitioner's Interrogatory No. 43.

5. Respondent's false position versus petitioner's March 31, 1965, Motion for production of respondent's "Funke file".

The above will be discussed in the order given.

1. Petitioner's Interrogatory No. 1 requested identification of all respondent's papers with respect to ". . . the conception, design, research and development of the Sunbeam Party Grill . . ." sandwich maker appliance. Respondent obtained an extension of time on the ground that Mr. Clark was the one person most familiar with respondent's files and that he was out of the country. Respondent's answer to Interrogatory No. 1 identified in excess of 900 documents, but not a single one of the eight (8) suppressed ones. See especially the suppressed document dated November 21, 1958, written by Mr. Jepson, and which on its face relates to the design or development of the Sunbeam sandwich toaster.

2. Petitioner's Interrogatory No. 36 was directed to whether or not respondent had a form letter or release form which it used for outside disclosures. Respondent's answer was "No" but should have been "Yes", see suppressed document dated August 12, 1958, signed by Mr. Funke and witnessed by Mr. Clark.

3. At the October 14, 1963, deposition of Mr. Clark he repeatedly testified (R, V 5, pp. 410-413, 510, 731) that he had no knowledge of the Wilkin device or its submission prior to 1962; but compare suppressed documents dated September 29, 1958, and November 26, 1958, which actually name Mrs. Wilkin. The handwritten note on the one dated September 29, 1958, is Mr. Rose's note to Mr. Clark, and the handwritten note on the one dated November 26, 1958, is by Mr. Clark's secretary of many years (R, V 4, p. 205). In view of these two suppressed documents, Mr. Clark clearly perjured himself to prevent petitioner from pursuing his examination in such a manner as would have led to the facts represented by the suppressed documents, and indeed, the documents themselves. On December 15, 1970, Mr. Clark admitted that

subsequent to his October 14, 1963, deposition he had some recollection of petitioner's disclosure to respondent (R, V 4, p. 201).

4. In petitioner's Interrogatory No. 43 respondent was asked to identify all documents in its files relative to or resulting from the spying by Mr. Cumming on the Wilkins. Respondent's answer omitted suppressed documents dated September 29, 1958; the one dated September 4, 1958, which still hasn't been produced, and also the one dated November 26, 1958, which contains information on Mrs. Wilkin's patent application gained from said spying.

5. On March 31, 1965, petitioner moved (R, V 5, p. 673) the District Court for an order commanding respondent to produce its "Funke file". This file contained all the suppressed documents, see paragraph 6 of Mr. Clark's affidavit dated May 19, 1970. Mr. Walther E. Wyss, respondent's Chicago counsel advised Mr. Malcolm Miller, respondent's Wichita counsel, that the Funke file contained nothing whatsoever relevant to petitioner's cause of action, see Mr. Wyss' April 2, 1965, letter to Mr. Miller (R, V 5, pp. 665-666) and also Mr. Wyss' testimony at R, V 4, p. 305 on what respondent's attorney told (no relevance) Judge Wesley E. Brown. In deciding that none of the suppressed documents had to be identified or produced Mr. Clark conferred with Mr. Wyss (R, V 4, pp. 244-246). When the matter came on for hearing before Judge Brown, petitioner said it wanted access to the Funke file to see how the Funke disclosure had been handled by respondent, such as whether a release had been obtained, and whether the earlier Wilkin disclosure had been referred to in turning down Mr. Funke (R, V 14, pp. 10-11). Judging from the suppressed documents, see especially the ones dated August 12, 1958; September

29, 1958; November 10, 1958, and November 26, 1958, petitioner was right on target in her reasons as to relevancy and materiality in chief and for access to the Funke file. Nevertheless, Mr. Miller, respondent's Wichita counsel, urged on the Court that there was no adequate showing for access. This was a gross misleading of and a fraud on the Court by respondent's attorneys.

In view of the above-outlined misconduct by respondent's attorneys petitioner went to trial without the suppressed documents and the facts represented thereby. For example, because of said misconduct, the jury never learned the following:

1. That in a later but similar situation respondent required a written waiver or release, see suppressed document dated August 12, 1958, and witnessed by Mr. Clark.

2. That the spying on the Wilkins was for Mr. Clark so he could reject Mr. Funke and payment to him on the basis of Mrs. Wilkin's priority, see suppressed documents dated September 29, 1958; November 10, 1958; and November 26, 1958.

3. That respondent's President Mr. Gwinn, and Mr. Jepson, respondent's Vice-President for Research and Development wanted to pay for a similar but later disclosure, see suppressed documents dated October 27, 1958, and November 10, 1958.

4. That Mr. Clark rejected Mr. Funke by pointing out that Mrs. Wilkin was first and by sending a part of her patent application to Mr. Funke and his attorney, Mr. Lee, see suppressed document dated November 26, 1958.

5. That Mr. Jepson probably had some knowledge of Mrs. Wilkin's disclosure, see suppressed document dated November 21, 1958.

In view of what was withheld from the jury by the misconduct of respondent's attorneys, the jury didn't have all the facts so returned a finding for respondent. The judgment entered thereon was affirmed by the Court of Appeals, 377 F.2d 344 (1967), and petition for writ of certiorari to this honorable Court was denied on December 4, 1967, 389 U.S. 973, 19 L. Ed. 2d 464 (1967).

Petitioner instituted her present action on November 15, 1968, to set that judgment aside and for a new trial. This was within one year following the denial of petition for certiorari. The action was precipitated by the anonymous mailing of the suppressed document dated September 29, 1958, to petitioner's attorneys. Proceeding under Rule 60 (b) in the District Court was authorized by the Court of Appeals, 405 F.2d 165 (1968).

In the action to set aside and for a new trial, which was a hearing and trial before Judge Brown on the question of fraud, there was further misconduct by respondent's attorneys. Respondent's attorneys repeatedly told Judge Brown that respondent's files had been searched and they could not find suppressed documents dated September 4, 1958, and September 29, 1958, and they were never identified for the reason that they had never seen or had them (R, V 9, pp. 68-71; R, V 1, pp. 35, 42, 46, 47; R, V 5, p. 453). The basis for this was Mr. Clark's sworn affidavit filed before Judge Brown. Mr. Clark is an attorney of record and participated in the instant and prior proceeding (R, V 4, p. 188).

In his affidavit dated November 27, 1968, Mr. George R. Clark swore he could not find suppressed documents dated September 4, 1958, and September 29, 1958, and he never had them or seen them [R, V 5, pp. 484-490 (note especially pp. 487-488)].

On the morning of December 15, 1970, in his live testimony before Judge Brown, Mr. Clark affirmed this (R, V 4, p. 225).

However, in the afternoon of the same day, December 15, 1970, in his further live testimony before Judge Brown, Mr. Clark testified that he placed the "X" mark in the lower right hand corner of suppressed document dated September 29, 1958, sometime before the prior 1965 trial during his review of the Funke file (R, V 4, pp. 261-263). More specifically, Mr. Clark's testimony was "It is my recollection that prior to trial I went through the Funke file and marked with an 'X' those documents . . ." (R, V 4, p. 262).

There's no possible way Mr. Clark could place the "X" mark on suppressed document dated September 29, 1958, without having seen and had it in his possession, and Mr. Wyss appears to confirm that the "X" marks were by Mr. Clark (R, V 4, p. 294). Therefore, Mr. Clark did see and have suppressed document dated September 29, 1958, and his affidavit dated November 27, 1968, and testimony during the morning of December 15, 1970, are false. Therefore, suppressed document dated September 29, 1958, wasn't identified or produced because it wasn't found, but because it was intentionally withheld.

The same is true with respect to suppressed documents dated August 12, 1958, and November 11, 1958, which have similar "X" marks by Mr. Clark, and suppressed document dated November 21, 1958, which Mr. Clark says was not in the Funke file (R, V 4, p. 191). That is to say, these also were intentionally withheld in the sense of suppression of the same, and not for any genuine belief that they weren't relevant or material, or that they couldn't be found.

ARGUMENT

The finding by the District Court of no fraud and the affirmance of same by the Court of Appeals is absolutely indefensible. The conduct of attorneys is a matter of grave public concern, so the courts below should have given reasons for deciding that there was not defilement of judicial process. However, none were given.

The specific acts of misconduct by respondent's attorneys comprise their refusal to identify suppressed document dated November 21, 1958, in response to petitioner's Interrogatory No. 1 on respondent's conception, design and development of its sandwich maker; their false answer to Interrogatory No. 36 (compare suppressed document dated August 12, 1958); their refusal to identify suppressed documents dated September 4, 1958, September 29, 1958, and November 26, 1958 in response to Interrogatory No. 43 on the spying; their misleading the District Court as to the contents of the Funke file relative petitioner's Motion of March 31, 1965, to produce the file; and perjury by Mr. Clark in his deposition of October 14, 1963, his affidavit of November 27, 1968, and his testimony during the morning of December 15, 1970.

Misconducts by attorneys are matters of grave concern to the bar, public and preservation of our judicial system. Nevertheless, there was not analysis by either of the lower courts of these acts of misconduct, nor any reasons for why they did not constitute a defilement of judicial process.

Petitioner's position is that the finding and affirmance of no fraud and no defilement is clearly erroneous,

and the absence of supporting reasons or analysis by both lower courts is a total abnegation of their responsibilities to litigants, the bar, the public and the judicial system. Petitioner's further contention is that if the bare conclusion of no fraud or defilement is put to the test of a supporting reasoned analysis it will not meet that test for the reasons heretofore detailed under the Statement of the Case and the Facts. That is to say, the indisputable facts shown by the suppressed documents and the statements of respondent's own attorneys will in no manner support a finding of no fraud or no defilement of judicial process.

Credibility

In refusing to review the matter of credibility the Court of Appeals totally abnegated its role of an appellate tribunal. The matter of credibility was fully briefed. It was an issue on appeal, and if an appellate court will not review the same it is not known what recourse there is for petitioner or other litigants in similar circumstances.

This was not a matter of an isolated minor instance of the veracity of a minor witness, but the cruxial credibility of an attorney charged with successive acts of misconduct and defilement of judicial process. Nor did reviewing the matter of credibility place any additional or undue burden on the appellate court, since it had already reviewed the entire record and this was a matter that could readily be reviewed solely on the basis of that same record. In other words, the appellate court was in as good a position as the District Court to pass on the question of credibility.

Furthermore, as with the matter of fraud or defilement, petitioner's position is that the credibility of re-

spondent's key witness is without any basis whatsoever. For example, Mr. George R. Clark, the keeper of respondent's files in this matter, and an attorney of record who actively participated in all the proceedings, committed perjury several times.

The first time Mr. Clark committed perjury was during his October 14, 1963, deposition when he stated that he had absolutely no knowledge of the Wilkin submission until 1962. That this is a lie is proved by the suppressed documents dated September 29, 1958, and November 26, 1958, both of which name the Wilkins. The one dated September 29, 1958, is routed to Mr. Clark by Mr. Rose's handwritten note thereon. The one dated November 26, 1958, was written by Mr. Clark, and contains his secretary's handwritten notation thereon. These two suppressed documents indisputedly show that Mr. Clark knew of the Wilkins and petitioner's disclosure to respondent at least as early as 1958, and that his deposition testimony was false. This was called to the attention of the Court of Appeals in detail.

Mr. Clark's affidavit dated November 27, 1968, and filed in the District Court during the hearing on the question of fraud is false. In this affidavit Mr. Clark swore that he didn't find and had never seen or had suppressed documents dated September 4, 1958, and September 29, 1958. In the morning of December 15, 1970, Mr. Clark affirmed this under oath before Judge Brown (R, V 4, p. 225). However, later, during his testimony given before Judge Brown on the afternoon of the same day, Mr. Clark admitted that he placed certain "X" marks on some of the Funke file documents sometime before trial, and this included the one dated September 29, 1958. Thus, by his own admission Mr. Clark proved that he in fact did

see and have suppressed document dated September 29, 1958. Thus, his prior affidavit and court testimony were false. This also was called to the attention of the Court of Appeals in detail.

In view thereof, for the District Court to resolve credibility in favor of respondent in face of the indisputable fact of perjury, and for the appellate court to refuse to review that finding, after it has been clearly called to the attention of the appellate court, are clear errors.

As stated in the petition for reconsideration, if credibility was correctly decided then new trial should be granted on the basis of evidence newly discovered within one year after the denial of petition for writ of certiorari, since that is the act that marked the ultimate finality of the judgment which petitioner seeks to set aside. In other words, if Mr. Clark is to be believed, then the established facts would be that Mr. Clark really did not remember anything about the Wilkins or their disclosure to respondent in 1957 or his subsequent referrals thereto, and that Mr. Clark also really did not have documents dated September 4, 1958, and September 29, 1958, to identify or produce, nor the one dated November 21, 1958, which he says was not in the Funke file.

Relevance and Materiality

The District Court held the suppressed documents not relevant or material, and the Circuit Court of Appeals affirmed that holding. Here again no reasons or analysis was given. In addition, that holding is clearly erroneous by virtue of the documents themselves and respondent's own statements. Respondent's attorneys admit the genuineness of the suppressed documents (R, V 4, pp. 24-26).

Respondent's attorneys also admit relevance and materiality since they admit that suppressed documents dated September 4, 1958, and September 29, 1958, should have been identified, see Mr. Wyss' letter to Mr. Miller dated September 30, 1968 (R, V 9, pp. 68-71 and R, V 5, p. 453). Also, suppressed documents dated September 29, 1958, and November 26, 1958, specifically name petitioner, and also probably the still missing one dated September 4, 1958; and the ones dated November 10, 1958, November 11, 1958, and November 21, 1958, at least inferentially name petitioner as being first. If the suppressed documents name petitioner and respondent admits they should have been identified, it is not understood how it can be held that they are not relevant or material.

Novelty

Both lower courts held that petitioner's disclosure to respondent was incapable of being the subject matter of misappropriation because they erroneously equated confidential proprietary information or a trade secret with absolute novelty in the patent sense. Obviously ideas, a working model of those ideas, and a pending patent application write up thereon to which the public does not have access can be the subject matter of a novel and useful disclosure to the recipient thereof even though it may not be ultimately patentable. This was true of petitioner's disclosure to respondent.

Briefly, the product we are here concerned with is an electric cooking device that will make filled and sealed toasted sandwiches. Mrs. Wilkin first disclosed this to respondent in 1957. There was a similar disclosure by Mr. Funke in 1958, but Mr. Funke was rejected on the basis of Mrs. Wilkin's priority. Nothing was said to Mrs.

Wilkin about the prior art or knowledge of the industry in turning her 1957 disclosure down. The only time respondent took the position that the disclosures were not novel is when it had to face up to the prospect of paying Mr. Funke in 1958, or Mrs. Wilkin after she complained that respondent was using her disclosure. At all other times respondent's acts and conduct show that it believed the device was new to the industry and even patentably novel as late as 1962.

Respondent Sunbeam Corporation is a leader in the home appliance industry with a great deal of knowhow and expertise with cooking appliances. Still, respondent found it necessary to spy on the Wilkins in 1958 relative subject matter which it would now have the courts believe respondent all along knew to be well known to the industry of which it is a leading member. All of respondent's actions and conduct show exactly the opposite belief by respondent.

When respondent rejected Mrs. Wilkin in 1957, it did not tell her that her device was old, but that it was too expensive. In 1958, when Mr. Funke came into the picture Mr. Gwinn, respondent's President, and Mr. Jepson, respondent's Vice-President for Research and Development, thought of making payment. This is shown by suppressed documents dated October 27, 1958, and November 10, 1958, and Mr. Clark's own testimony given on December 15, 1970 (see R, V 4, p. 198), wherein he admits they wanted to pay a "finder's fee" therefor.

When respondent was dealing with Mr. Funke, respondent found it necessary to spy on the Wilkins relative the same kind of device. When respondent finally got into production in 1961 with its similar cooking de-

vice, the Sunbeam Party Grill, it was advertised as being a revolutionary cooking appliance. Indeed, as late as 1962 respondent filed a broad patent application in the name of Mr. Jepson, its "Thomas Edison of the home appliance industry". At trial the District Court wasn't too keen on testimony as to the breadth of respondent's patent application because it was of the view that all patent attorneys overstate and overclaim their client's inventions (R, V 4, p. 212). Be that as it may, petitioner requests this honorable Court to note that Messrs. Wyss and Clark are the attorneys in Mr. Jepson's patent application for the Sunbeam Party Grill, and the sample broad claim heretofore set forth was broad enough to cover Mrs. Wilkin's device.

As heretofore outlined, Mr. Clark perjured himself during his deposition of October 14, 1963; false and willfully incomplete answers were given to petitioner's several Interrogatories; and petitioner's March 31, 1965, request for the Funke file was falsely and willfully obstructed; and all this was for the purpose of preventing all the above facts from ultimately reaching the jury. The evidence documents of novelty and trade secret to the respondent, and showing the reasons for the 1958 spying activities of the respondent were not presented to the jury and were not considered by the Court of Appeals in affirming the judgment entered by the jury verdict, because they were suppressed by respondent. Thus, the jury decided the question of novelty of petitioner's disclosure to respondent in favor of respondent with much less than the whole truth. The jury had a distorted picture since it only knew those facts which were favorable to respondent, and because of perjury, fraud and suppression none of the facts that were unfavorable to respondent on the question of novelty of petitioner's disclosure to respondent.

This was one of the questions for which petitioner requested a jury trial and the lower courts have in effect removed the question of novelty to respondent from the jury, which alone is the proper first judge of that question. Otherwise, petitioner will not have had a trial or her day in court in the constitutional sense. Moreover, the above-outlined actions and conduct by respondent and respondent's attorneys are antagonistic to the finding of no novelty whatsoever in Mrs. Wilkin's disclosure to respondent *at the time it was made* and subsequent value to and use by respondent. Review thereof by this honorable Court is requested, since if the courts below believe they are as well qualified as a jury to rule on the question of novelty to respondent, then petitioner says then so is this honorable Court.

The Law

The refusal of the District Court to set aside the prior judgment and grant a new trial was an abuse of discretion for the reasons heretofore set forth, and both courts below erred in not applying the law of the land as represented by the rationale or doctrine of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.* decided by this honorable Court in 1944 and reported at 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250.

With the suppressed documents petitioner certainly would have had a good claim in the main action to present to the jury. However, *Hazel-Atlas* v. *Hartford-Empire* pronounced that attorney misconduct is a defilement of judicial process, and that once attorney misconduct is shown the courts don't have much discretion in the matter but to set aside the ill-gotten judgment. That is to

say, once attorney misconduct is shown the courts should not try to assess how much of an impact the misconduct had on the previous outcome or whether or not the outcome would have been the same or different absent the attorney misconduct.

This is a salutary rule of law since then the bar will know with certainty what is expected. Rightfully, attorneys, who are officers of the courts, should be held to the highest standards of conduct. Anything short of that is to invite borderline cases of attorney misconduct, destroy public confidence in the bar, and foster distrust in the judicial system.

The instant case is not a borderline case, but a glaring example of systematic and flagrant disregard by attorneys of the purpose and meaning of discovery and oaths, and indeed, a total disrespect for the courts and judicial process.

CONCLUSION

In view of the foregoing, the decisions below should be reversed, the prior judgment set aside, and new trial granted.

Wherefore, grant of the instant petition for writ of certiorari is requested.

Respectfully submitted,

EVERETT C. FETTIS
One Twenty Building
Wichita, Kansas 67202

and

ROBERT C. ALLAN
1002 West Douglas
Wichita, Kansas 67203

and

JOHN H. WIDDOWSON
306 Bitting Building
Wichita, Kansas 67202

and

DALE M. STUCKY
1600 Wichita Plaza Building
P. O. Box 997
Wichita, Kansas 67202
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July Term, 1972

No. 72-1058

KATHLEEN K. WILKIN,
Plaintiff-Appellant,

v.

SUNBEAM CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. W-2677)

(Filed August 30, 1972)

John H. Widdowson (Robert C. Allan and Everett C. Fettis on the brief) for Plaintiff-Appellant.

Malcolm Miller (Robert C. Foulston, George R. Clark and Walther E. Wyss; Foulston, Siefkin, Power & Eberhardt, and Mason, Kolehmainen, Rathburn & Wyss, of Counsel, on the brief) for Defendant-Appellee.

Before BREITENSTEIN, HILL and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This case is here for the third time. Plaintiff-appellant Wilkin seeks review of the trial court's denial of relief under Rule 60(b), F.R.Civ.P.

Plaintiff sued defendant-appellee Sunbeam Corp. alleging that Sunbeam obtained from her secret information concerning a novel device, given in confidence, and used by Sunbeam to its benefit. After trial, judgment was entered for Sunbeam on the jury's verdict. On appeal we affirmed, Wilkin v. Sunbeam Corp., 10 Cir., 377 F.2d 344, and certiorari was denied, 389 U.S. 973. Later, plaintiff filed a motion in this court for Rule 60(b) relief. We held that the issues raised were for trial court determination. Wilkin v. Sunbeam Corp., 10 Cir., 405 F.2d 165.

Plaintiff conceived a device for cooking or toasting sandwiches, pies, and other preparations containing fillers. Plaintiff's husband demonstrated the device to Sunbeam which said that it had no interest. Later, Sunbeam made and marketed a device which accomplished many of the results of plaintiff's device. After the filing of the complaint but before trial, the Patent Office rejected plaintiff's application for a patent on the device.

At the trial, it was shown that Sunbeam employed an investigator to determine the status of plaintiff's patent application and the commercial use of her device. This phase of the case was submitted for jury consideration. In our first opinion, we held that the issues of novelty, confidential disclosure, and use by Sunbeam were properly presented for jury determination and that its verdict adverse to plaintiff would not be disturbed. 377 F.2d at 346-347.

After our affirmance of the judgment for Sunbeam, attorneys for plaintiff received an anonymous letter purporting to disclose a document from Sunbeam's files. Later, several other anonymous letters with enclosures were received by plaintiff's attorneys and the trial judge. The implications of the letters were that in the course of

the trial and antecedent discovery proceedings Sunbeam had withheld documents showing the receipt and use of confidential information.

The trial court was concerned with the claim of fraud made in the Rule 60(b) motion and with the charges and countercharges of unprofessional conduct levied against attorneys connected with the case as advocates or witnesses. With patience and caution, the trial court conducted a series of hearings over a two-year period. In the course thereof, it developed that the author of the anonymous letters was a patent lawyer who had been discharged by Sunbeam. Plaintiff produced an affidavit by the author and Sunbeam countered with affidavits of several of its lawyers.

On July 14, 1970, more than a year and a half after the presentation of the Rule 60(b) motion, the court, on the basis of the pleadings, affidavits, and exhibits, filed a memorandum and order in which it made a careful and painstaking analysis of the claims of the parties and held that the plaintiff's showing was insufficient to entitle her to Rule 60(b) relief. Among other things, the court said: "Mrs. Wilkin simply did not possess the novel idea which was the primary and essential factor of her claims against Sunbeam." The court went on to say that Sunbeam counsel had withheld information which could have disposed of the matter shortly after the anonymous letters were received, and imposed sanctions, in the way of payment of expenses and attorneys' fees, against Sunbeam.

Plaintiff moved for reconsideration and in December, 1970, the court held a two-day hearing at which each party was given full opportunity to produce such evidence and arguments as were wished. Among other things, the author of the anonymous letters and several Chicago counsel

for Sunbeam testified. The scope of the examination and cross-examination of witnesses and of the receipt of documents was such that every opportunity was afforded to explore the issues presented. The author of the anonymous letters, when asked by Sunbeam counsel where he got the copies of documents attached to his affidavit, claimed his Fifth Amendment rights and declined to answer.

After the hearing, the court reaffirmed its denial of Rule 60(b) relief and eliminated the sanctions which it had previously imposed against Sunbeam. The court said:

> "Indeed, after hearing the testimony and reviewing for the last time (we hope), the evidence in the case we are convinced that defendant was not guilty of practicing fraud on the Court. Plaintiff and her attorneys were dissatisfied with the result of her claim and her witness gave them an opening to continue the action with the hope that they could get some money from the defendant."

Mindful of the gravity of the charges made by plaintiff, we have examined the record in detail and are convinced that the trial court's careful and methodical analysis thereof is fair, accurate, and complete. It need not be repeated here. After the unnecessarily vituperative charges and countercharges are put aside, the factual bases for plaintiff's claims are (1) the spying activities of Sunbeam, (2) the nonproduction of certain documents, and (3) the allegedly untruthful statements of certain Sunbeam counsel relating to such documents. The spying activities were presented to the jury in the trial and were considered by this court in its opinion affirming the judgment entered on the jury verdict. 377 F.2d at 346. Nothing more need be said in this regard.

Several of the allegedly suppressed documents came from what was known as the Funke file. Pursuant to court order, Sunbeam produced that file at the trial, and plaintiff made no use of it. The trial court held that the documents in question were irrelevant and immaterial to the issues. We agree. The statements of the lawyers presented a credibility issue which the trial court resolved against the plaintiff. We will not review such credibility findings.

Plaintiff seeks relief under Rule 60(b)(3) which abolishes the distinctions between extrinsic and intrinsic fraud. Under the rule, a judgment may be set aside for fraud discovered after the entry of judgment. Brady v. Beams, 10 Cir., 132 F.2d 985, 987, cert. denied 319 U.S. 747. Relief under the rule may be granted when the application is clearly substantiated by adequate proof. Consolidated Gas & Equipment Co. of America v. Carver, 10 Cir., 257 F.2d 111, 114. A Rule 60(b) motion is addressed to the sound discretion of the trial court, and the burden of establishing fraud is on the movant. Abel v. Tinsley, 10 Cir., 338 F.2d 514, 516; see also Thomas v. Colorado Trust Deed Funds, Inc., 10 Cir., 366 F.2d 136, 139. Also, a showing must be made that the movant would have had a good claim or defense in the main action. See Gomes v. Williams, 10 Cir., 420 F.2d 1364, 1366.

Rule 60(b) does not limit a court's power to redress fraud on the court. The term "fraud on the court" is a nebulous concept. A clear example is the corruption of judicial officers. Root Refining Co. v. Universal Oil Products Co., 3 Cir., 169 F.2d 514, 534, cert. denied sub nom. Universal Oil Products v. William Whitman Co., 335 U.S. 912. In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, the Supreme Court extended the concept to a

situation where a bogus scientific article was published to affect the outcome of patent litigation. The fabricated article was relied on, at least in part, by the court of appeals in its decision. Hazel-Atlas is an example of fraud which so defiles the court "that the judicial machinery can not [sic] perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Martina Theatre Corp. v. Schine Chain Theatres, Inc., 2 Cir., 278 F.2d 798, 801, quoting 7 Moore, Federal Practice ¶ 60.33, at 512. We are concerned with documents which both we and the trial court deem irrelevant and with credibility questions which the trier of fact has determined adversely to the plaintiff.

When the case was here the first time we said, 377 F.2d at 347:

> "The uncontroverted evidence reveals that the principles incorporated in appellant's device were known to the industry prior to appellant's application for patent and therefore there was no trade secret which could be disclosed."

Plaintiff has come forward with no new evidence which would change that holding. She has not sustained the burden of establishing fraud. Nothing which she has presented shows a defilement of the judicial process. The trial court patiently heard everything which she had to offer and with untiring industry analyzed her many claims. The denial of Rule 60(b) relief was not an abuse of discretion. On the record presented we are unable to see how the trial court could have reached any other result.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-2677

KATHLEEN K. WILKIN,
Plaintiff,

vs.

SUNBEAM CORPORATION,
Defendant.

(Filed January 5, 1971)

ORDER

This matter is before the Court on the motion of the plaintiff to set aside a judgment of this Court, affirmed on appeal and certiorari denied. The motion is brought under Rule 60(b) of F.R.Civ.P. We have previously set forth our views with respect to the law covering proceedings under 60(b), and we will not repeat them here. In our Memorandum dated July 14, 1970, we reviewed the factual claims of the parties as shown by affidavits filed by both sides. Plaintiff's insistence that she had been wronged by Defendants' fraud and here further claim that she could produce the witness to prove it, a patent lawyer formerly employed by the Defendant. This witness, whose testimony was already before the Court by affidavit, testified in substance in accordance with his affidavit. He, however, took the Fifth Amendment when asked how he acquired the documents and whether he had sent copies of the documents to the Court and plaintiff's counsel after the case had been finally decided.

A most charitable view of the testimony of plaintiff's witness leads to the conclusion that his actions were motivated by a desire for revenge upon the defendant because he had been fired and an egocentric personality which led him to believe that his view was omnipotent as to what was or was not relevant to the issues before the Court, [the later] even though he had not participated in the preparation of the case or the trial itself.

The defendant's witnesses also gave testimony substantially as indicated in their affidavits. They did, however, explain to the Court's satisfaction the reason for not coming forward as quickly as the Court felt appropriate. Their testimony and that of plaintiff's witness clearly indicates that they could not be certain of his identity. For the defendant to have brought him forward at a much earlier time would have been for conjectural reasons and would have been regarded by him as another effort to persecute and belittle his legal abilities.

We have concluded that our criticism of the defendant and its counsel as set forth in the Memorandum was too harsh. Indeed, after hearing the testimony and reviewing for the last time (we hope), the evidence in the case we are convinced that defendant was not guilty of practicing fraud on the Court. Plaintiff and her attorneys were dissatisfied with the result of her claim and her witness gave them an opening to continue the action with the hope that they could get some money from the defendant. The Court itself under the standards with which it is bound was unable to dispose of the matter summarily, but was required to hold an evidentiary hearing. In this day we are hearing that there must be a finality to litigation and indeed there is some indication that now complaint is being made that trial judges are holding too many eviden-

tiary hearings. This litigation must end. Our actions are documented and may be reviewed.

We deny the motion of the plaintiff, for the reasons set forth in our Memorandum of July 14, 1970; we amend our Memorandum by striking any condemnation of defendant or its attorneys and the allowance of fees and expenses to the plaintiff and her attorneys. Each of the parties will bear their own costs.

IT IS SO ORDERED.

At Wichita, Kansas this 5th day of January, 1971.

/s/ Wesley E. Brown
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-2677

KATHLEEN K. WILKIN,
Plaintiff,

vs.

SUNBEAM CORPORATION,
Defendant.

(Filed July 14, 1970)

MEMORANDUM AND ORDER ON MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b) F.R.C.P.

In 1962 Mrs. Wilkin filed suit seeking damages for alleged misappropriation of confidential information by defendant Sunbeam in connection with its development and production of an electric sandwich maker, referred to as the "Party Grill", which was marketed in 1962. Mrs. Wilkin alleged that she developed a similar device, applied for a patent on same, and demonstrated her model to Sunbeam in February, 1957. Her patent application was not approved. The evidence introduced at trial was submitted to the jury under instructions setting out the essential elements which were prerequisites to judgment in her favor: 1) that the idea disclosed must be novel; 2) that it must be made in confidence; and 3) that it must be adopted and made use of by the defendant.

The jury resolved the issues in favor of defendant, and on appeal the judgment was affirmed. *Wilkin v. Sunbeam Corporation* (10th Cir. 1967) 377 F. 2d 344. Certiorari

was denied on December 4, 1967, 389 U.S. 973, 19 L. Ed. 2d 464.

On November 15, 1968 Mrs. Wilkin filed Motion for Relief from Judgment and For New Trial under the provisions of Rule 60(b) Federal Rules Civ. Procedure alleging fraud, misrepresentation and other misconduct on the part of defendant in concealing material evidence from plaintiff and the Court, and because of other fraud upon the Court. This motion was precipitated by the receipt by plaintiff's counsel of a copy of a letter dated September 29, 1958 from a private investigator, U. O. Cumming to the defendant Sunbeam, bearing a handwritten notation. This copy was received by anonymous mail in an envelope postmarked September 9, 1968 in New York City.

Request for leave to proceed on this Motion was filed in the 10th Circuit Court of Appeals. The appellate court determined that Rule 60(b) does not require a preliminary petition in the appellate court for permission to reopen proceedings in the District Court, and the motion was denied as being unnecessary. *Wilkin* v. *Sunbeam Corporation* (1968) 405 F. 2d 165. While the time for filing the motion on the ground of newly discovered evidence had elapsed, the Circuit Court further noted that Rule 60(b) does not limit the power of a Court to relieve a party from a judgment for fraud practiced upon the Court. This question was left for determination here.

Due to the grave allegations concerning fraud upon the Court this matter has been held open for the purpose of allowing plaintiff full discovery procedures and time to discover all evidence which may bear upon the issue. While the motion has been pending, three additional anonymous communications were received by plaintiff's counsel and this Court and the Court endeavored to afford

plaintiff every opportunity to ascertain the identity of the person who was forwarding copies of letters and memorandum, apparently obtained from the files and records of Sunbeam. At the most recent hearing held on January 12, 1970, the Court directed plaintiff to file all evidence pertaining to her motion within a thirty-day period, for the reason that the Court felt that in fairness to the parties the motion could not be held open indefinitely, regardless of new anonymous communications.

On May 14, 1970, plaintiff filed the affidavit, with exhibits, of Walter Lewis, a patent attorney and former employee of Sunbeam. It appears that Mr. Lewis is the person who sent the anonymous communications to plaintiff's counsel and this Court. Sunbeam has filed opposing affidavits, and in addition, a Motion to strike the Lewis affidavit on the ground that it was filed beyond the thirty-day period last allowed by the Court.

The Motion to Strike will be Overruled. The Court finds that plaintiff has been diligent in efforts to ascertain the identity of the person forwarding the communications. On May 19, 1969, after numerous motions and cross-motions, Sunbeam finally furnished to plaintiff the names of some twenty former employees of its patent department, with last known addresses. Among these was the name of Walter Lewis. It appears, however, that as of the date of the last hearing in this matter, January 12, 1970, plaintiff had been unable to make a full investigation of leads furnished by these names, and that she was unaware, at that time, of the identity of the anonymous communicant. The Court was also under the impression that Sunbeam had no knowledge of such person's identity. It now appears, however, that shortly after the first communication was received in September, 1968, Mr. Walther E. Wyss of Chicago, one of the attorneys representing Sunbeam during

trial in this Court, had good cause to know and to believe that Walter Lewis was the person in question.[1] Under such circumstances, the affidavit of Walter Lewis, and its exhibits will be fully considered by the Court.

The evidence submitted in support of the motion to set aside the Judgment may be summarized as follows:

1. A letter from U. O. Cumming, International Service Corporation, a private investigator, addressed to Neil M. Rose, a patent attorney of Sunbeam, under date of September 29, 1968. Exhibit 1 is a copy of this letter bearing a hand written notation from Rose to his superior, Mr. Clark, to the following effect:

> "In view of our current knowledge of the art should we call him off before he racks up too big a bill?"

The content of the letter is to the effect that Mrs. Wilkin is afraid that someone is going to steal her invention. Plaintiff contends that this letter shows that Mrs. Wilkin treated her device as confidential, and that it indicates that both Mr. Clark and Mr. Rose were aware of the investigation being conducted by U. O. Cumming, contrary to certain statements in deposition and at trial. Plaintiff also

---

1. Mr. Wyss wrote to Mr. Lewis, at an address in Scarsdale, New York, on October 21, 1968:

> "Enclosed herewith is a copy of a letter dated September 29, 1958 and a copy of the envelope in which this letter was recently sent to the Wichita law firm of Fettis & Allan. You are the only person who could have sent this letter to Fettis & Allan or directed that it be sent . . ." [Ex. 21, Lewis Affidavit.]

Sunbeam's Answers to Interrogatories, listing names of former employees and "address as shown by company filed", dated May 19, 1969, lists an address for Walter Lewis in LaGrange, Illinois. [Dkt. #183] Inasmuch as Sunbeam possessed a current address for Mr. Lewis, the Court is not impressed with its "technical compliance" with discovery orders issued for the purpose of investigating charges involving prior fraud upon the Court.

contends that the letter, by referring to a previous letter of September 4th, which has never been disclosed, proves that Sunbeam has been deliberately suppressing vital evidence contrary to pre-trial discovery orders issued by the Court.

By affidavits Sunbeam states that although their files have been diligently searched, they have been unable to find copies of the letters of September 4th or September 29, 1958.

2. Inter-office Memorandum dated May 1, 1963, from Neil Rose to George R. Clark. [Ex. 2]. This letter concerns Mr. Rose's visit to a friend in the patent office for the purpose of inciting some sort of disciplinary action by the patent office against Mr. Widdowson, plaintiff's attorney and a discussion of whether or not this Court might censure his conduct. This memorandum was written some time after the patent office had denied Mrs. Wilkin's patent.

3. Letter from George Clark of Sunbeam to Edmund S. Lee, patent attorney for L. J. Funke, under date of November 26, 1958, together with copy of release in favor of Sunbeam executed by L. J. Funke on August 12, 1958 [Exhibit 3]. The letter refers to Sunbeam's general familiarity with the art, and contains the following statement:

> "I have already explained to Mr. Funke that, prior to the time he submitted his toaster, we were already generally familiar with devices of this type. As an example, I am enclosing copies of patents drawings of a toaster we studied quite some time ago. In that application is still pending, you will understand why I have blocked out the information as to the

identity of the inventor. In this case, the sample submitted was somewhat crude and did not readily lend itself to the conducting of a market study."

The copy of the letter bears a handwritten notation to the following effect:

"See OI & I General Kathleen K. Wilkin."

Plaintiff contends that this letter is proof that Sunbeam's alleged prior knowledge of the art was derived from Mrs. Wilkin's device; that Sunbeam had made copies of her patent drawings, and wrongfully used them in developing the Sunbeam party grill. Plaintiff also contends that the signed release from Mr. Funke indicates that defendant's witnesses were lying when they stated that it was not the policy of the company to obtain signed releases in 1957 and 1958 when there were patents pending.

4. Copy of Inter-office Memo under date of November 21, 1958 from Mr. Jepson, Sunbeam's designer to a Mr. Dokos [Exhibit 4]. It concerns design of the Sunbeam device and contains the following statement.

"I believe you are familiar with the special sandwich toaster that we had submitted to us some time ago. We would like to add this to our development list in the Cooking Appliance Division. This method of making filled sandwiches is evidently old, judging from several patents that have been taken out. The same idea was submitted by another party a year ago and lately by Mr. L. G. Funke. Mr. Funke's contribution to the art evidently is only the method of latching the two halves together. Therefore, in designing our sandwich maker we must avoid any resemblance to his method of latching the two grids."

Plaintiff contends that this exhibit is further proof that Sunbeam used her design in development of the party grill.

5. Letter from Walter Wyss, Sunbeam's patent attorney, to Mrs. L. J. Funke, under date of February 12, 1965, forwarding $50 as payment for the model of the Toaseal toaster, the Funke device. [Exhibit 4]. An affidavit of Mr. Wyss establishes that this payment represented the purchase price paid by Sunbeam for the Funke device presented in evidence at the trial of this case.

Exhibits 1, 2, 3, and 4, discussed above, were the anonymous communications forwarded to the Court and plaintiff's counsel. Additional evidence relied upon by plaintiff in support of her motion is the affidavit of Walter Lewis, and exhibits attached thereto. This affidavit sets forth the following matters:

a) Mr. Lewis is a registered patent attorney, and was employed by Sunbeam from July 15, 1959 to July 21, 1967.

b) That during such time he was familiar with the Wilkin and Funke submissions to Sunbeam, as well as the proceedings in this court, and that he had access to, and examined Sunbeam files with reference to these matters.

c) That he heard discussions between Messrs. Clark and Rose of the Sunbeam patent department concerning the trial of this case and that from such discussions he believes that files and records were deliberately suppressed by Sunbeam.

d) That it has always been the policy of Sunbeam to obtain written release from condifential disclosures from those persons who submit ideas to the company, and this was the policy in effect at the time of the Wilkin submission.

Exhibits attached to the Lewis affidavit, in addition to copies of Exhibits 1—4 previously discussed, are the following:

1. Inter-office Memo from Mr. Jepson to Mr. Clark, dated October 27, 1958, concerning the Funke device and the possibility of paying him some compensation. [Exhibit 3, Lewis Affidavit].

2. Another memo dated November 19, 1958 from Mr. Clark advising that it would be better not to pay Mr. Funke anything. [Exhibit 4, Lewis aff.]

3. Letter from Mr. Clark to Mr. Funke, dated November 11, 1958, denying payment and relying on prior art, including the Fajen, Strietelmeir and Hall patents. [Exhibit 5, Lewis Affidavit].

4. Letter from Mr. Wyss, Sunbeam's patent counsel to the John T. Lynch Co., under date of May 16, 1963, apparently ordering a private investigation of two individuals, that is, Mr. Wilkin and Mr. Widdowson, plaintiff's counsel. [Exhibit 9, Lewis Affidavit].

5. Two copies of letters from Sunbeam's local counsel to Mr. Wyss concerning claim of privilege and the Court's *in camera* examination of certain documents. [Exhibit 10 and 11, Lewis Affidavit].

6. Inter-office Memo from Mr. Clark under date of October 21, 1963 concerning profits from sale of the Party Grill. [Lewis Affidavit, Exhibit 12].

7. Letter of March 26, 1964 between Sunbeam counsel with reference to assumed named of U. O. Cumming. [Exhibit 13, Lewis Affidavit.]

8. Letters concerning purchase of the Funke model from Mrs. Funke in 1965 [Exhibits 14 and 15, Lewis Affidavit].

The remaining exhibits attached to the Lewis Affidavit concern Mr. Lewis' personal problems with the Sunbeam Corporation and indicate his belief that the trial of this case was improperly handled by Sunbeam's patent department.

Rule 60(b), in pertinent part, provides:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken* . . . This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the Court . . ." [Emphasis supplied.]

When grounds for relief rest upon allegations of newly discovered evidence, or fraud, misrepresentation or other misconduct by an adverse party, such grounds are subject to the one year limitation period of the Rule. Although there appears to be no authority from the Tenth Circuit upon the question, the Court is of the opinion that the one year limitation applies in the instant case, which

period runs from the date adverse judgment was entered in this Court—that is, May 28, 1965 [Dkt. #132]. In arriving at a determination that the limitation is not tolled by appeal, the Court is guided by the language of the Rule itself, and see Comment, 7 Moore's Fed. Practice ¶60.28[2] p. 320-321, f.n. 37; *Vaughan v. Petroleum Conversion Corp.* (D.C. Conn. 1953) 120 F. Supp. 175, 178, aff'd 211 F. 2d 499, cert. denied, 348 U.S. 873, 99 L. Ed. 687.

In any event, and assuming that the one year limitation period runs from the date certiorari was denied by the Supreme Court, the Court is further of the opinion that plaintiff's evidence is not such as would justify a new trial upon grounds of new evidence or fraud or other improper action by agents of Sunbeam.

It has long been settled that the "newly discovered evidence" which would justify the grant of new trial under Rule 60(b)(2) must meet certain standards. It must be such that a) it could not have been discovered with reasonable diligence; b) it must not be merely cumulative or impeaching; c) it must be material and relevant to the real issues; and d) it must be of such character that on new trial such evidence would probably produce a different result. See *Marshall's U.S. Auto Supply v. Cashman* (10th Cir. 1940) 111 F. 2d 140, 142, cert. denied 85 L. Ed. 428; *Sanders v. Gehring* (10th Cir. 1969) April 21, 1969 No. 9952, Unreported.

Applying these rules to Mrs. Wilkin's evidence on this matter, the Court finds that the evidence offered with reference to the U. O. Cumming transactions with Sunbeam would be at most cumulative or impeaching. Evidence concerning Mr. Cumming, in his disguise as "Robert Laird" was fully explored at trial. On appeal the Tenth Circuit discussed plaintiff's contention that such "under-

cover activities" in and of themselves could in some manner establish plaintiff's right to recover damages from Sunbeam, and found no authority for such assertion. The vital issue, of course, was whether or not Mrs. Wilkin had a new trade secret or novel idea which could have been, or was, elicited by Mr. Cumming. The appellate court found that she did not: [377 F. 2d at 347].

> "The uncontroverted evidence reveals that the principles incorporated in appellant's device were known to the industry prior to appellant's application for patent and therefore there was no trade secret which could be disclosed."

All of the "new evidence" pertaining to Sunbeam's dealings with the device submitted by Mr. Funke would likewise be cumulative or impeaching. At trial plaintiff fully explored into the development of the Party Grill by Sunbeam and the aspects of the Funke device, along with other prior art, were submitted to the Jury. In addition, the Court finds that all evidence relating to the Funke device was available to plaintiff at the time of trial, notwithstanding the fact that the Court had ruled that certain matters were privileged. The Pre-trial Order required defendant to make the Funke file available at trial. The Court is satisfied that it was available, and any evidence therein was discoverable by plaintiff at that time.

With respect to other items of evidence offered by plaintiff in support of her motion, the Court is satisfied that they are irrelevant and not material to the essential element of plaintiff's case, that is, the required finding that Mrs. Wilkin must have possessed a trade secret or novel idea in the first instance. After review of the trial transcript, the Court is firmly of the opinion, as was the appellate Court, that the evidence overwhelmingly indi-

cated that she did not possess such novel idea, inasmuch as the principles of her device were known long prior to her submission. The Court further finds that all of plaintiff's new evidence, considered as a whole, would be merely cumulative and impeaching, and would be incapable of raising the necessary probability of a different result at a new trial. See *Sanders v. Gehring, supra.*

There remains only the question of whether the cumulative effect of the evidence presented on this motion convinces the Court that the judgment should be set aside by reason of fraud upon the Court.

The fraud which would justify relief from judgment in an independent action, not subject to the one-year limitation of Rule 60(b), must be extrinsic fraud, collateral to the matter tried by this Court. It must be something more than the matters set out in Parts (1)-(5) of Rule 60(b).[2] In an independent action, a Court will not set aside a judgment because it was founded on perjured evidence or testimony. *United States v. Throckmorton,* 98 U.S. 61, 25 L. Ed. 93 (1878); *Lockwood v. Bowles* (D.C. 1969) 46 F.R.D. 625. In those few cases in which fraud upon the Court has justified relief there were extraordinary circumstances and outrageous conduct involving actual corruption of the judicial process itself, such as bribery of a judge or juryman. See Comment and Discussion of cases 7 Moore's Federal Practice ¶60.33, at pp. 510-511. The paramount interest of the public in the requirement that there must be some end to litigation of a controversy in the courts is set out in the *Throckmorton* case, 25 L. Ed. 93 at p. 96:

---

2. See *Federal Deposit Insurance Corporation v. Alker,* (E.D. Pa. 1962) 30 F.R.D. 527; aff'd 316 F.2d 236, cert. den. 11 L. Ed. 2d 111, 280, 628, 7 *Moore,* Federal Practice ¶60.27 at 295-312; *Davis v. Wadsworth Construction Co.,* (E.D. Pa. 1961) 27 F.R.D. 1.

> "That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

The record before this Court at this time requires some further comment. The conduct of Mr. Wyss in withholding the information he had concerning the actions and whereabouts of Lewis is not approved. Indeed, the conduct of Lewis is suspect. Both Wyss and Lewis showed a contemptous disregard for the time and effort of the Court to investigate the contentions of fraud. By the same token the conduct of house counsel of Sunbeam leaves much to be desired.

The Court does not find that Sunbeam committed an injustice, or that an injustice was done to Mrs. Wilkin in the trial of this case. To the contrary, and after review of the entire record in this case, the Court is convinced that the Jury could have reached no other verdict in view of the prior art in the field. Mrs. Wilkin simply did not possess the novel idea which was the primary and essential factor of her claims against Sunbeam. See *Jungersen v. Axel Brothers, Inc.* (S.D.N.Y. 1954) 121 F. Supp. 712, affirmed, 217 F. 2d 646, cert. denied, 349 U.S. 940, 99 L. Ed. 1267, rehear. den. 100 L. Ed. 769.

In view of the foregoing, the Court is of the opinion, and so determines that plaintiff's Motion for Relief from the Judgment should be Overruled.

This does not dispose of Sunbeam's conduct in the Rule 60 matter. Acting thru Wyss and its house counsel it

withheld information, which could have disposed of this matter shortly after it first had knowledge of the anonymous letter from Lewis. Sanctions under Rule 37, F.R.C.P., we believe, should be applied against Sunbeam for its withholding of available information which could have shortened the time required to dispose of Wilkin's claims under Rule 60. Upon proper application by Wilkin, the Court will consider the allowance of reasonable expenses including the attorneys fees in accord with the spirit of Rule 37(c) F.R.C.P. caused by Wyss' failure to timely disclose to this Court his knowledge of Lewis' whereabouts and conduct.

IT IS ORDERED that plaintiff's Motion for Relief from Judgment and for New Trial be and it is hereby OVERRULED.

IT IS FURTHER ORDERED that Wilkin submit to this Court within ten (10) days any claim for the allowance of reasonable expenses and attorneys fees resulting from the conduct of Sunbeam set forth above.

The Clerk is directed to forward copies of this Memorandum and Order to the parties herein.

At Wichita, Kansas this 14th day of July, 1970.

(Signed) Wesley E. Brown
United States District Judge

COPY BOUND CLOSE IN CENTER

A25

August 12, 1958

Sunbeam Corporation
5600 Roosevelt Road
Chicago 50, Illinois

Gentlemen:

The undersigned hereby agrees that the sandwich toaster shown by him to your Company today was submitted voluntarily and not as a disclosure in confidence. The undersigned further agrees that his property rights in the said sandwich toaster are to be measured solely by such patent protection as he may obtain.

L. J. Funke

George R. Clark

A26

INTERNATIONAL SERVICE CORPORATION

SPECIALIZING IN SERVICES FOR PATENT AND TRADE MARK ATTORNEYS AND PATENT DEPARTMENTS

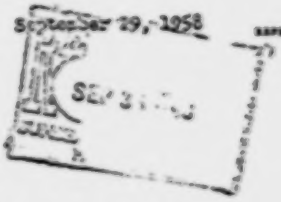
11 WEST 42ND STREET

NEW YORK CITY, 36

TELEPHONE PENNSYLVANIA 6-8883

September 29, 1958

REFER TO FILE



Mr. Neil M. Rose
Sunbeam Corporation
5600 Roosevelt Road
Chicago 50, Ill.

Re- Sandwich Grilling Machi

Dear Mr. Rose;

Again referring to your letter of Sept 4th on the above matter, I had heard nothing from Mrs Wilkin after my telephone call about a week ago as if I were clos by in Kansas City, and had a talk with her husband who see to be a sort of a nut. In other words, they are afraid to give out any information about this device and I do not kn why.

Therefore, last Friday I had a talk with Mr. Widdowson, as if I were in Kansas City again, and explaine the situation to him, and he said he was in the same positi but would be glad to give me the desired information if th would authorize him to do so, and the only thing I could g out of him is that there is a pending application and no licenses have been issued.

It appears from my conversation that Mrs Wil is afraid that someone is going to steal the invention fr under their eyes. I am keeping after this matter and wil advise you.

Yours very truly

U. O. Cumming
President

UOC/ma/1

ESTABLISHED 1927

COPY BOUND CLOSE IN CENTER

WRITE IT
Don't Depend on Verbal Instructions or Memory

Sunbeam CORPORATION

INTER-DEPARTMENT CORRESPONDENCE

OCT 29 1958
SUNBEAM CORP.
PATENT

Memo to Mr. G. R. Clark Date 10/27/58

Subject Sandwich Toaster submitted by L. J. Funke Copies to

During our last executive meeting we discussed the sandwich toaster submitted by L. J. Funke. It is true that the patent protection this man will be able to get perhaps is of very little value, and if the appliance is successful there will be nothing to stop practically anybody from making such a device. Mr. Funke, however, did bring this to our attention, and I feel (and I believe this was the feeling of Mr. R. P. Gwinn also) that it would not be fair to this man just to go ahead and design around his claims, especially since he disclosed this to us without some sort of compensation. I would like to discuss this with you because we are supposed to start some work on this device.

L. Jepson

A27

PAGE BOUND VERTICAL

WRITE IT
Don't Depend on Verbal Instructions — Memory

Sunbeam CORPORATION
INTER-DEPARTMENT CORRESPONDENCE

Memo to 330.25 Date November 10, 1958

Subject L. J. Funke Copies to Mr. I. Jepson

On November 7 I discussed with Mr. R. P. Gwinn the sandwich toaster submitted by Mr. L. J. Funke. During the course of this discussion we reviewed Mr. Jepson's memo of October 27 which suggests the possibility of compensating Mr. Funke for his efforts in arousing our interest in such a device. I explained to Mr. Gwinn that such a sandwich toaster is well known in the art and that Funke will be unable to get any significant protection even though he might get certain claims limited to the hinge and latch structure.

I pointed out that Funke seems to have a good deal of time and money invested in his device and that, in my opinion, offering him a small sum of money in an effort to avoid future embarrassment might very well have exactly the opposite result. I think Funke would be suspicious, and upon rejecting our offer, would set out to cause us some trouble. As things now stand, we have what I believe to be a quite strong argument against contributing to Mr. Funke. Not only is the toaster old in the art, but a similar construction was submitted to us more than a year earlier by a different party. Most important, however, is the fact that we got Funke to sign an unconditional release by the terms of which he has agreed that his rights "are to be measured solely by such patent protection as he may obtain". He signed this release voluntarily knowing from his past experience full well what it meant.

Mr. Gwinn agreed that we should inform Mr. Funke that we are not interested in his construction. We will proceed with our own development work, and naturally, will exercise caution so as not to infringe any of the claims which are being prosecuted in the Funke application.

O. R. Clark

ORC:rh

SUNBEAM CORPORATION
NOV 12 1958
RESEARCH & DEVELOPMENT DEPARTMENT

COPY BOUND CLOSE IN CENTER

BLURRED COPY

A29

November 11, 1958

r. L. J. Funke
4 Cooley Drive
ongmeadow 6, Mass.

Re: Sandwich Toaster

ear Mr. Funke:

e have now completed our evaluation of your sandwich
oaster, but as I predicted during our conversation of
ctober 16, our people have decided that we would not be
nterested in acquiring any rights with respect to your
ending patent application.

know you are aware that sandwich toasters of this character
re very well known in the art. This, of course, is evidenced
y patents such as Fajen 2,969,561, Strickland 2,463,437
nd Hall 2,587,314. In addition, we have on the past had
ccasion to consider units almost identical to your model you
eft with us which were called to our attention by others.
have carefully examined your pending patent application,
hich Mr. Lee was so kind as to make available to us, but
y own personal opinion is that such claims as you might
ventually obtain will not be of a scope sufficient to deter
thers from producing appliances almost exactly like yours
oth structurally and in operation. Under these circum-
tances, our feeling is that any appliance manufacturer is
ree to go ahead with the development of such a toaster.

am making arrangements to have your model returned to you
y insured parcel post. We all appreciate your courtesy
nd consideration in submitting your toaster for our evalua-
ion, and we are sorry that the facts and circumstances do
ot warrant the reaching of a different conclusion on our
art. In any event, we wish you success with your venture.

Yours very truly,

George R. Clark
Patent Counsel

RClrh

c: Edmund S. Lee, Esq.

A30

WRITE IT
Don't Depend on Verbal Instructions or Memory

Sunbeam CORPORATION

INTER-DEPARTMENT CORRESPONDENCE

Memo to Mr. S. J. Dokos — Date 11/21/58

Subject Sandwich Maker — Copies to C. Wickenberg

I believe you are familiar with the special sandwich toaster that we had submitted to us some time ago. We would like to add this to our development list in the Cooking Appliance Division. This method of making filled sandwiches is evidently old, judging from several patents that have been taken out. The same idea was submitted by another party a year ago and lately by Mr. L. G. Funke. Mr. Funke's contribution to the art evidently is only the method of latching the two halves together. Therefore, in designing our sandwich maker we must avoid any resemblance to his method of latching the two grids.

We believe that a toggle arrangement can be worked out that would go over dead center rather than having to latch the operating lever down. Such toggle arrangement, from a simplicity standpoint, should be located in the center, but perhaps it would be better to stay still further away from Funke's construction and have a toggle latch at each end and an operating handle that would consist of a plastic covered bar extending the full width of the grill so as to simultaneously latch each side. This might be slightly more expensive, but I believe in checking into the construction further we might find this has advantages.

There has been some objection to the fact that too much of the bread is cut off, and many people do not like to [illegible]. Therefore, it has been suggested that instead of round units a [illegible] shape with rounded corners should be used so that when a standard piece of bread is utilized the least amount of crust and bread would be cut off. As far as the general construction is concerned, I picture a one-piece upper and lower die-cast grid with a tubular element placed in each grid. The lower grid would have the thermostat control in direct contact with the grid, with some sort of temperature adjusting device in front of the lower grid. Both the upper and lower grids would be covered by stamped chrome plated shells similar to waffle baker shells. For low cost, it might also be advisable to consider an open element supported on ceramic insulators similar to our present waffle baker. We do not feel it is necessary to remove the grids for cleaning.

When you have carefully studied the attached correspondence, please return it to Mrs. O'Quinn for filing.

I. Jopson

IJ:rec
Att.

COPY BOUND CLOSE IN CENTER

BLURRED COPY

A31

November 26, 1958

Edmund S. Lee, III, Esq.
Chapin & Neal
Third National Bank Building
Springfield 1, Massachusetts

Re: Funke Sandwich Toaster

Dear Mr. Lee:

Your letter of November 14 questions our running a market test of Mr. Funke's design as being "anomalous" in view of our statement that we have seen almost identical sandwich toasters in the past. Frankly, I fail to see the existence of any anomaly whatsoever in our procedure.

I am sure that you have had a good deal of experience with semi-crude models submitted by outsiders. Frequently, it is difficult to evaluate such devices because of their rough appearance. Mr. Funke showed us what he represented to be a "commercial" model of his sandwich toaster made from production tools. After signing a release, he agreed wholeheartedly to our making a small consumer reaction test of his device. This, we submit, is not anomalous but routine. As a matter of fact, we are continually running market tests on what some people might think are only minor variations in our standard products.

I have already explained to Mr. Funke that, prior to the time he submitted his toaster, we were already generally familiar with devices of this type. As an example, I am enclosing copies of patents drawings of a toaster we studied quite some time ago. In that the application is still pending, you will understand why I have blocked out the information as to the identity of the inventor. In this case, the sample submitted was somewhat crude and did not readily lend itself to the conducting of a market study.

November 26, 1958

Edmund S. Lee, III, Esq.
Chapin & Neal
Third National Bank Building
Springfield 1, Massachusetts

Re: Funke Sandwich Toaster

Dear Mr. Lee:

Your letter of November 14 questions our running a market test of Mr. Funke's design as being "anomalous" in view of our statement that we have seen almost identical sandwich toasters in the past. Frankly, I fail to see the existence of any anomaly whatsoever in our procedure.

I am sure that you have had a good deal of experience with semi-crude models submitted by outsiders. Frequently, it is difficult to evaluate such devices because of their rough appearance. Mr. Funke showed us what he represented to be a "commercial" model of his sandwich toaster made from production tools. After signing a release, he agreed wholeheartedly to our making a small consumer reaction test of his device. This, we submit, is not anomalous but routine. As a matter of fact, we are continually running market tests on what some people might think are only minor variations in our standard products.

I have already explained to Mr. Funke that, prior to the time he submitted his toaster, we were already generally familiar with devices of this type. As an example, I am enclosing copies of patents drawings of a toaster we studied quite some time ago. In that the application is still pending, you will understand why I have blocked out the information as to the identity of the inventor. In this case, the sample submitted was somewhat crude and did not readily lend itself to the conducting of a market study.

COPY BOUND CLOSE IN CENTER

Edmund S. Lee, III, Esq. November 26, 1958

I hope these comments serve to answer the questions raised by your letter.

Yours very truly,

George R. Clark
Patent Counsel

GRC:am
Encl.

cc: Mr. L. J. Funke

FILE COPY

FILED

DEC 20 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-778

KATHLEEN K. WILKIN,

Petitioner,

vs.

SUNBEAM CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

MALCOLM MILLER,
600 Fourth National Bank Building,
Wichita, Kansas 67202,

WALTHER E. WYSS,
20 North Wacker Drive,
Suite 3200,
Chicago, Illinois 60606,

GEORGE R. CLARK,
5400 West Roosevelt Road,
Chicago, Illinois 60650,
Counsel for Respondent.

THE GUNNISON-GALESBURG PRINTING COMPANY, CHICAGO

INDEX.

SUBJECT INDEX. PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement 2

Reasons for Denying the Writ 6

Argument 8

I. There Is No Conflict Between the Opinion Below and the Opinion of Any Other of Our Courts of Appeal. The Decision Below Is in Accord with the Pronouncements of This Court 8

II. There Is No Credible Evidence of Perjury, Misstatements, or Wrongdoing on the Part of Respondent's Witnesses as Determined by the Trial Court Who Heard Such Witnesses Live in Open Court. The Decision Below Is Manifestly Correct 9

III. Respondent Did Not Suppress Any Documents and Did Not Commit Any Fraud Upon the Court. Petitioner and the Court Were Well Aware of the "Funke File" and It Was Only as a Result of the Petitioner's Strategy That the Documents Therefrom Did Not Become a Part of the Record in the Original Trial 11

Conclusion 16

Appendix A1

AUTHORITIES.

Cases.

Abel v. Tinsley, 338 F. 2d 514 (10th Cir. 1964) 7,8

Assmann v. Fleming, 159 F. 2d 332 (8th Cir. 1947) 7,8

Atchison, Topeka & Santa Fe Railway Co. v. Barrett, 246 F. 2d 846 (9th Cir., 1957) 7,8

Hazel-Atlas Glass v. Hartford-Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) 6,8

Valmont Industries, Inc. v. Enresco, 446 F. 2d 1193 (10th Cir., 1971), certiorari denied, 405 U. S. 922, 92 S. Ct. 960 (1972) 7,8

Winfield Assocs., Inc. v. Stonecipher, 429 F. 2d 1087 (10th Cir. 1970) 7,8

Other Authorities.

7 Moore's Federal Practice and Procedure:

¶ 60.33, p. 511 8

¶ 60.37[1], p. 617 8

Federal Rules of Civil Procedure:

Rule 34 6

Rule 60(b) 8,9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-778

KATHLEEN K. WILKIN,

Petitioner,

vs.

SUNBEAM CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 466 F. 2d 714 (1972). Such opinion affirmed the judgment of the United States District Court for the District of Kansas, which was entered after a full evidentiary hearing in favor of Respondent and against Petitioner. A petition for rehearing was denied by the Court of Appeals on October 2, 1972 and its mandate was spread on October 11, 1972.

The dispute between the parties has been before this Court before. It was a misappropriation case tried before a jury in the United States District Court for the District of Kansas which rendered its judgment in accordance with

the jury verdict in favor of Respondent and against Petitioner. An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment and jury verdict, reported at 377 F. 2d 344 (1967). A petition for rehearing was denied by the Court of Appeals on June 12, 1967. Its mandate was spread and effective June 26, 1967. This Court denied certiorari 389 U. S. 973, 88 S. Ct. 472, 19 L. Ed. 2d 464 (1967).

JURISDICTION.

Jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED.

In a situation where Petitioner, after jury trial and judgment in favor of Respondent which judgment was affirmed on appeal, rehearing denied and certiorari denied by this Court, and where more than a year after the mandate from the Court of Appeals was spread, filed a motion for relief from judgment based on an alleged fraud upon the court; and where after a full evidentiary hearing including testimony from every live witness about whom complaint was made and a consideration of all documentary evidence, the court that originally heard the controversy resolved questions of credibility and determined that no fraud was practiced upon the court which judgment was affirmed by the Court of Appeals:

Did such courts abuse their discretion so as to warrant the granting of a petition for certiorari by this Court?

STATEMENT.

Petitioner originally tried her misappropriation case in the United States District Court for the District of Kansas where jurisdiction lay because of diversity of citizenship

with the requisite amount in controversy. The agreed issues tried in such litigation were:

1. Whether anything was disclosed in confidence by Petitioner to Respondent;
2. Whether what was disclosed to Respondent was novel; and
3. Whether Respondent used anything disclosed to it by Petitioner in its Sunbeam Party Grill.

Trial was had on these issues and the jury verdict was for the Respondent. Judgment was entered by the trial court in accordance with such verdict, appeal was taken and the judgment of the District Court was affirmed. Rehearing was denied and a petition for certiorari was denied.

More than a year after the mandate of the Court of Appeals was spread and effective, Petitioner filed a motion for relief from judgment based upon an alleged fraud upon the court. The United States Court of Appeals for the Tenth Circuit determined (405 F. 2d 165) that the trial court was in a better position to pass on the issues raised than the Court of Appeals. Thereafter the trial court over a period of twenty two (22) months held seven (7) hearings on the Petitioner's complaints seeking the basis and all possible evidentiary support for the allegations of fraud upon the court, including a two-day hearing in which the court heard through live witnesses all matters in dispute and heard the very witnesses of whom Petitioner asserted fraud, perjury and suppression of documents.

Petitioner's assertions fall into two catgories:

1. That witnesses either in depositions or at trial testified falsely, and
2. That the attorneys for the Respondent intentionally suppressed documents and were guilty of a fraud upon the court in such suppression.

The documents allegedly suppressed fall into two categories:

1. Documents not found in Respondent's files, and
2. Documents not shown to the Petitioner in the discovery process because the trial court specifically declined to grant Petitioner's belated motion for their production although it did order these documents to be available at trial in case Petitioner should seek them, which she did not do.

In the first category there are two documents involved. One was sent to the Petitioner's attorneys anonymously. It is contained in the appendix to the Petition at page A26. The crux of its contents was exactly as described in the original trial.* The only discrepancy was that the witness recalled the events recited as a telephone conversation rather than as a letter. The other document, no copy of which has ever been found, is only referred to in such letter and may or may not have ever existed. The first letter (Appendix to Petition, p. A26) contains a handwritten note which Petitioner alleges is of major significance. It was the recollection of the witness Clark to whom it is directed (his initials are GRC) that he never saw the document since his initials are not crossed off and, it was his invariable practice to cross off his initials when he had seen any document bearing a routing designation to him.

Obviously such letter was at one time in Sunbeam's files, and if it had been located in its files, would have been produced and discovered in the pretrial discovery. In all likelihood Petitioner's witness Lewis, a disgruntled ex-employee of Sunbeam, removed such document from Sunbeam's files

* All other documents relating to the matter involved in this one letter were before the jury and also before this Court. See Appendix A to Respondent's Brief in opposition to the first petition to this Court (No. 606: October Term 1967).

and sent it to Petitioner's lawyer anonymously, for when Lewis was examined on such point as well as on many others, he sought refuge under the Fifth Amendment, and accordingly, no one can be certain that the letter was in the files of Sunbeam when they were searched.

The documents in the second category above were contained in the so-called "Funke file". Petitioner was aware of such file at least as early as the hearing before the trial court on December 16, 1963 but never asked for production until just before the trial. The trial court heard the motion to produce the "Funke file" at the final pretrial hearing held on April 6, 1965. The transcript of said hearing on this point is very illuminating. Petitioner's Counsel, Mr. Fettis, said (pp. 9 through 10*):

> "MR. FETTIS: May I say one thing further: Now, our other motion filed is that we have asked that they deliver to us for our inspection at this late date their correspondence or agreements had with Mr. Funke.
>
> "Now, this I perhaps should apologize for not having done this much sooner but the significance somewhat escaped me until we were reviewing some of these matters after our discovery and after our most recent conferences and **we learned perhaps what we should have realized a long time ago**, and that is that the Funke device—now, the Funke device was a similar device similar to ours and similar to the Sunbeam Party Grill which was submitted to them about a year after our matter was submitted to them. They ran cooking tests on the Funke device and it would appear now from a view of the whole file, so to speak, that the Funke submission perhaps triggered the study and ultimate development of the Sunbeam Party Grill.
>
> "Now, because of the similarities and because of this series of events, we think that we should be permitted at this time to examine any correspondence

* Pages 9 to 18 of the transcript of the portion of the April 6, 1965 hearing relating to the "Funke file" are contained in the appendix hereto pages A1 to A8.

with Funke or any agreements that they might have entered into with Funke, if any, and ascertain the connection that that might have to this lawsuit.

"Now, unfortunately early in this case we submitted what we thought were pretty broad general interrogatories. **I am not quarreling with counsel on this but they interpreted our interrogatories a little more narrowly than we had intended for them to be. I am not suggesting that there is anything wrong about this.** But certain matters were not disclosed to us in answer to interrogatories. We feel that this is one of them.

"Now, **true, we were asking about the Wilkin matter and they perhaps rightly felt that the Funke matter had nothing to do with the Wilkin matter,** but these matters are so closely interrelated that we feel that we should be permitted to examine these matters and see if they are not pertinent to our cause of action." (Emphasis added).

The trial court on April 6, 1965 denied Petitioner's belated motion for production of the "Funke file" because of the failure of Petitioner to show "good cause" for its production as was then required by Rule 34 of the Federal Rules of Civil Procedure. However, the court ordered Respondent to have the "Funke file" available at the trial and as shown hereinafter even advised Petitioner as to how to make the necessary showing to obtain the documents contained in such file. Petitioner never attempted at the trial to follow the trial court's suggestion nor took any other action to obtain the documents. She simply ignored the documents.

REASONS FOR DENYING THE WRIT.

1. The decision below is not in conflict with any decisions of any other court of appeals and is in accord with the principles pronounced by this Court in *Hazel-Atlas*

Glass Co. v. *Hartford-Empire Co.*, 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

2. The decision below involves no abuse of discretion and is manifestly correct. The facts were determined by the trial court after hearing live testimony from the very persons about whom Petitioner complains. The legal principles applied by the Court of Appeals and by the trial court are well settled and recognized by many of our courts of appeal. *Winfield Assocs., Inc.* v. *Stonecipher*, 429 F. 2d 1087 (10th Cir., 1970); *Abel* v. *Tinsley*, 338 F. 2d 514 (10th Cir., 1964); *Valmont Industries, Inc.* v. *Eurosco*, 446 F. 2d 1193 (10th Cir., 1971); *Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (9th Cir., 1957); *Assmann* v. *Fleming*, 159 F. 2d 332 (8th Cir., 1947).

ARGUMENT.

I.

There Is No Conflict Between the Opinion Below and the Opinion of Any Other of Our Courts of Appeal. The Decision Below Is in Accord with the Pronouncements of This Court.

Petitioner proceeded under Rule 60(b) F. R. C. P. Relief is sought upon the basis of an alleged fraud upon the court. The landmark case is from this Court, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra.* Relief from the judgment based upon fraud upon the court is well recognized. Some confusion among a few of the decisions has occurred because of an effort to distinguish between extrinsic and intrinsic fraud. See 7 Moore's Federal Practice and Procedure, ¶ 60.37[1], page 617 and ¶ 60.33, page 511, et seq.

The burden is upon the Petitioner to prove the alleged fraud by clear and convincing evidence. It is well established, particularly where the court that decided the matter originally hears the Rule 60(b) motion, and especially where such court hears such motion through live witnesses who testified on the very gravamen of the matter in controversy and resolves such controversy, that such decision will only be set aside on a clear showing of abuse of discretion. See among many cases all setting forth the same principle: *Winfield Assocs., Inc.* v. *Stonecipher, supra; Abel* v. *Tinsley, supra; Valmont Industries, Inc.* v. *Enresco, supra; Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett, supra; Assmann* v. *Fleming, supra.*

Originally this case was heard as a misappropriation case in the United States District Court for the District of Kansas before a jury, Judge Brown presiding. The jury

verdict was affirmed by the Court of Appeals and certiorari was denied by this Court as set forth hereinabove. Petitioner's motion under Rule 60(b) was also heard by the United States District Court through Judge Brown. The witnesses about whom complaint was made by Petitioner testified in person before Judge Brown. His decisions denying relief were affirmed by the Court of Appeals in accord with the decisions of this Court and well established practice. Obviously, there was no abuse of discretion.

II.

There Is No Credible Evidence of Perjury, Misstatements, or Wrongdoing on the Part of Respondent's Witnesses as Determined by the Trial Court Who Heard Such Witnesses Live in Open Court. The Decision Below Is Manifestly Correct.

Petitioner repeatedly asserts that Respondent's lawyer Clark testified untruthfully. Actually Mr. Clark did not testify at the original trial, albeit his deposition was taken but was not introduced into evidence by Petitioner. He did testify in open court at the two-day hearing on Petitioner's Rule 60(b) motion. Contrary to Petitioner's argument Mr. Clark did not testify falsely* during his deposition concerning whether Respondent had a form letter or release form used for outside disclosures. Petitioner's exhibit (Appendix p. A25) is obviously not a form release, but a tailor-made release and, as Mr. Clark testified, which he prepared particularly for Mr. Funke's signature since Mr. Funke presented a device to Sunbeam without bringing a copy of

*Mr. Clark also never testified as Plaintiff alleges (p. 15 of Petition) that "he had absolutely no knowledge of the Wilkin submission until 1962." He did testify at a deposition taken on October 14, 1963 that it was *his recollection* that he had no knowledge of the Wilkin device or its submission to Sunbeam prior to 1962.

his patent application, unlike Petitioner who presented a device with her patent application.

Mr. Clark did not point out to Mr. Funke that Petitioner was first. This is clearly evident from Petitioner's own exhibit contained in the appendix to her Petition (p. A29) wherein Clark pointed out, long before this litigation arose, that sandwich toasters (such as Mr. Funke's) were well known in the art as evidenced by U. S. patents such as Fajen 1,969,361, Strietelmeier, 2,463,439 and Hall 2,587,314. Petitioner's submission to Respondent was indeed in 1957 prior to the Funke submission to Respondent in 1958, but both submissions were of devices old in the art and well known to Respondent. This is also shown by the exhibits contained in the appendix to Petitioner's petition at A28, A30 and A31.

Petitioner's argument about the "X" marks in the corners of documents contained as exhibits to Petitioner's appendix is erroneous. Petitioner's witness Lewis, who took the Fifth Amendment, testified that he was told that the "X" mark was put on documents to indicate that they had been considered and it was concluded they had nothing to do with the Wilkin lawsuit, and accordingly, Petitioner was not entitled to see the documents (V. 4, pp. 53-54). Actually, Mr. Clark testified that prior to trial he went through the "Funke file" and put a red "X" on the documents in that file which had not been shown to the court *in camera** and that copies of the documents corresponding to the *in camera* documents were marked "CONF" meaning that the documents so marked had been held to be privileged. Petitioner's statement that Mr. Clark testified that he placed the "X" mark on the September 29th letter is completely inaccurate. Mr. Clark's testimony was that he never saw the September 29th letter. While it is true

* A number of documents were shown to the trial court *in camera* and were held to be privileged.

that there are "Xs" on some of Petitioner's documents (note Appendix A25, A26, A29), there is no evidence that Mr. Clark put such "Xs" on such documents submitted by Petitioner. Mr. Lewis could well have put the "X" mark on the document before sending it anonymously to one of Petitioner's attorneys.

There are many more examples that could be discussed. In the interest of brevity, we only point out once again that the trial court heard live all the witnesses having anything to do with the matters about which Petitioner complains and resolved those issues as a trial court must. The Court of Appeals affirmed and stated at 466 F. 2d 717:

> "On the record presented we are unable to see how the trial court could have reached any other result."

III.

Respondent Did Not Suppress Any Documents and Did Not Commit Any Fraud Upon the Court. Petitioner and the Court Were Well Aware of the "Funke File" and It Was Only as a Result of the Petitioner's Strategy That the Documents Therefrom Did Not Become a Part of the Record in the Original Trial.

Respondent did develop what is characterized as the Sunbeam Party Grill, its research and development beginning as shown during the original trial in December of 1958. The Funke submission occurred just prior thereto. There was no novelty in the Wilkin device and she was unable to obtain a patent despite diligent efforts to obtain one, including two separately filed applications in the United States Patent Office, one filed December 3, 1956 and the other on May 16, 1962. (Respondent and Funke each got some narrow claims allowed in their respective patents, none of which covered the Wilkin submission.)

Petitioner was aware of the Funke device which was received into evidence as an exhibit in the jury trial and was aware of the Funke submission prior to the trial of the original case. Indeed, this whole matter was considered by the trial court at the final pretrial conference held on April 6, 1965, shortly prior to the first trial (see the attached Appendix pages A1-A8). At that time Petitioner was well aware of the reason the "Funke file" was not produced and was not even quarreling with Respondent on the matter. Petitioner's view *then* is in sharp contrast with her view *now* that somehow the "Funke file" was suppressed in such manner as to constitute a fraud on the court. The trial court was aware of the "Funke file" and denied Petitioner's motion for production of the "Funke file" brought on the eve of trial because of failure to show any cause much less good cause for its production. The trial court, however, *did* require Respondent to have the "Funke file" available in the courtroom at trial and it was. The trial court and Petitioner's attorney determined together how it could be used as noted from the transcript of the pretrial conference of April 6, 1965 (Appendix pp. A2-A3):

"THE COURT: • • •

"Now, then, your problem about Funke, you are in effect asking for a showing of documents under Rule 34 for which there has to be an adequate reason. You have taken the depositions of all the people who dealt with Funke, haven't you?

"MR. FETTIS: Yes.

"THE COURT: So that you have their statements with respect to what happened."

• • • • •

"MR. FETTIS: • • •

"I will agree that **the significance of some of this should not have escaped my attention at the time of some of these depositions** but, nevertheless, it did and it was only after a review of a lot of things.

"THE COURT: Well, —

"MR. FETTIS: They will be using the Funke device in this trial. We weren't aware of that at the time of this deposition.

"THE COURT: They will be using the Funke device, is that correct?

"MR. MILLER: If the Court please, it is listed as an exhibit and they went through this very matter when they took the depositions in Chicago. Mr. Jepson told them it was the Funke device. The problem I have with this is not only the showing, as you correctly point out under Rule 34, but the timing involved in it. I don't want to be in the position of trying to cover up anything but if we go into this area now we could well put off the time of trial again and I don't think, if you balance the two, it is worthwhile.

"They do know and are aware and everybody was aware for a year and a half that Mr. Funke brought in a device to Sunbeam, made from production tools, because this is what they ascertained in the deposition, if in no other manner. That device was at least identified during those depositions and in Mr. Jepson's deposition. There certainly was no secret about it. It is a thing that we have all known for a year and a half that he did make such a submission in the summer of 1958."

Furthermore, after stating: "**I will tell the defendant now to have their correspondence with Funke available** [at the trial]" (p. 15* of April 6, 1965 Transcript), the Court, during the final pretrial conference, specifically pointed out to Petitioner's counsel how the Funke documents could be obtained at the trial during the following colloquy (Transcript of April 6, 1965, pp. 17-18; Appendix to this Brief pp. A7 to A8):

"MR. FETTIS: For instance, here is what will happen: we will ask them, as we have already, whether or

* Page A5 of Appendix hereto.

not they entered into any agreement to pay anything to Funke for his submission which he made to them and which I understand they will say, 'No.'

"THE COURT: All right.

"MR. MILLER: That is what I told them because that is what I understand.

"MR. FETTIS: Then if we ask them on what grounds they turned him down, I don't know what the answer to that will be. I assume it will be because they felt he had nothing that was novel or patentable and so forth.

"THE COURT: Well, when they are on the witness stand you can certainly be able to inquire if they did turn them down, 'Did you write a letter turning them down.'

"MR. FETTIS: That is what I am getting to.

"THE COURT: Yes, I know what you are getting to. If they say, 'Yes, we did,' you can say, 'Let me see the letter.'

"MR. FETTIS: That is what I want.

"THE COURT: **That isn't any problem. That is why I am having them have them [the "Funke file"] here.**

"MR. FETTIS: That is fine.

"THE COURT: **And you better put 'agreements or correspondence'.**

"MR. MILLER: 'Correspondence.'

"THE COURT: 'Or, agreements with Funke.'

"MR. MILLER: That is what I understood you meant.

"THE COURT: Yes. And this would be on cross-examination.

"MR. FETTIS: Yes, this is fine.

"THE COURT: **We are not trying to keep you from it.**

"MR. FETTIS: **I know that.**" (Emphasis added.)

Clearly, the documents from the "Funke file" were not suppressed and no fraud was committed on the court.

The only other documents which Petitioner asserts were suppressed are two letters between Sunbeam and the International Service Corporation, one purportedly dated September 4 (which may never have existed since it has not been found by anybody) and one dated September 29, 1958 (Appendix to Petition p. A26). This document should have been produced by Respondent and would have if it were contained in Respondent's file. Obviously, it must have been removed therefrom and we submit the only logical explanation is that Petitioner's witness Lewis removed it from Sunbeam's files and sent it anonymously to Petitioner's counsel. A review of the September 29th letter and Petitioner's arguments make it abundantly clear that there is nothing of relevance in the letter which was not brought out by the other exhibits and the testimony at the trial regarding the relationship between Respondent and Mr. U. O. Cumming.

The trial court with great patience in seven (7) hearings spread out over almost two years heard all of Petitioner's complaints, held the hearings required and resolved the issues in accordance with established practice. The only thing unusual in the Petition is the intemperate language of Petitioner and the rank conclusions drawn by Petitioner supported solely by Petitioner's choice of vituperate adjectives.

Manifestly the decision below is correct and there is nothing in the proceedings which warrants this Court's use of its power to supervise the lower Federal Courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari be denied.

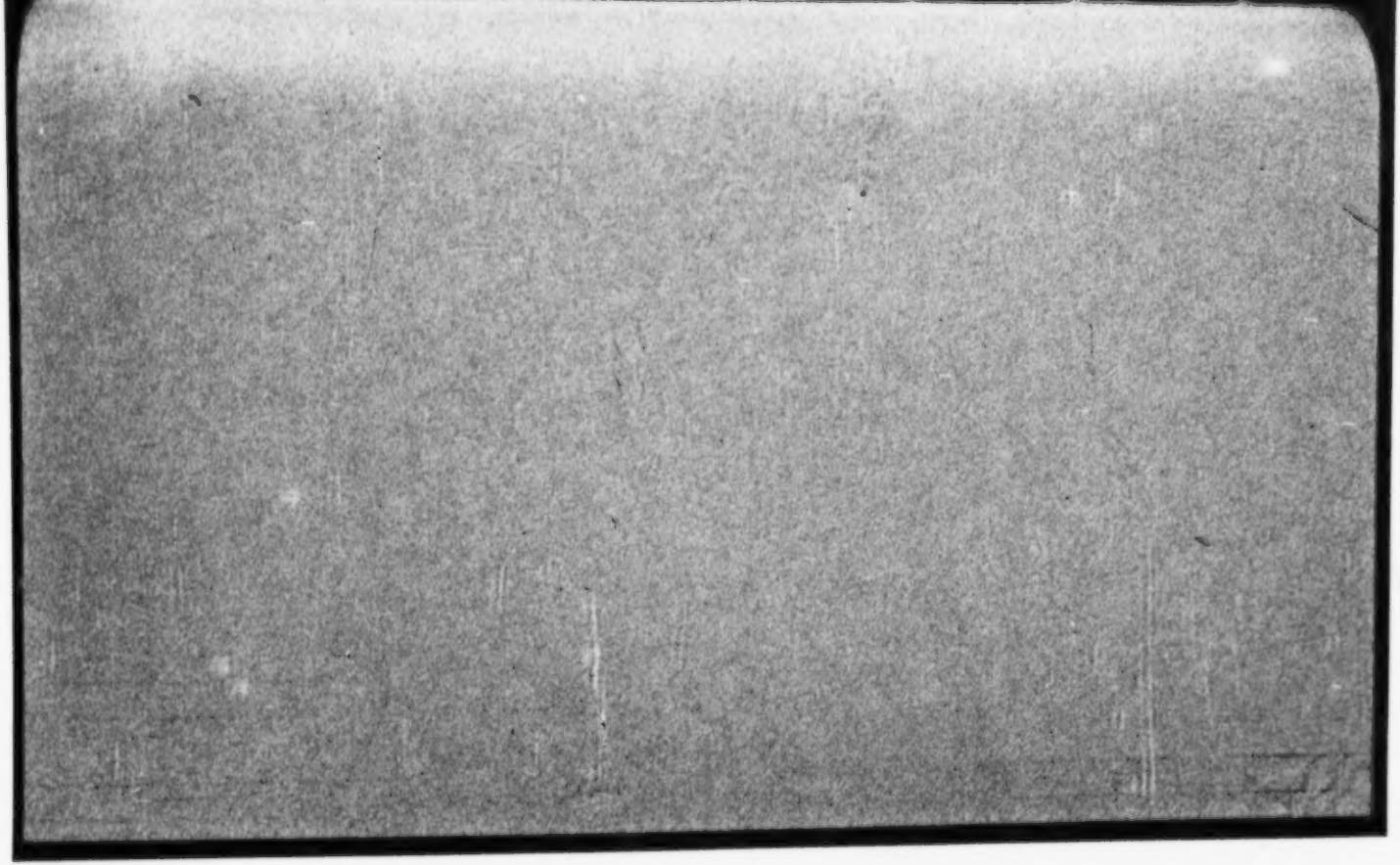
Respectfully submitted,

MALCOLM MILLER,
600 Fourth National Bank Building,
Wichita, Kansas 67202,

WALTHER E. WYSS,
Suite 3200,
20 North Wacker Drive,
Chicago, Illinois 60606,

GEORGE R. CLARK,
5400 West Roosevelt Road,
Chicago, Illinois 60650,
Counsel for Respondent.

Appendix



APPENDIX.

Pages 9 to 19 of Transcript of Hearing Before Trial Court Held April 6, 1965.

Mr. Fettis: May I say one thing further: Now, our other motion filed is that we have asked that they deliver to us for our inspection at this late date their correspondence or agreements had with Mr. Funke.

Now, this I perhaps should apologize for not having done this much sooner but the significance somewhat escaped me until we were reviewing some of these matters after our discovery and after our most recent conferences and we learned perhaps what we should have realized a long time ago, and that is that the Funke device—now, the Funke device was a similar device similar to ours and similar to the Sunbeam Party Grill which was submitted to them about a year after our matter was submitted to them. They ran cooking tests on the Funke device and it would appear now from a view of the whole file, so to speak, that the Funke submission perhaps triggered the study and ultimate development of the Sunbeam Party Grill.

Now, because of the similarities and because of this series of events, we think that we should be permitted at this time to examine any correspondence with Funke or any agreements that they might have entered into with Funke, if any, and ascertain the connection that that might have to this lawsuit.

Now, unfortunately early in this case we submitted what we thought were pretty broad general interrogatories. I am not quarreling with counsel on this but they interpreted our interrogatories a little more narrowly than we had intended for them to be. I am not suggesting that there is

anything wrong about this. But certain matters were not disclosed to us in answer to interrogatories. We feel that this is one of them.

Now, true, we were asking about the Wilkin matter and they perhaps rightly felt that the Funke matter had nothing to do with the Wilkin matter, but these matters are so closely interrelated that we feel that we should be permitted to examine these matters and see if they are not pertinent to our cause of action.

For instance, we were given a reason, our client was given the reason, for the original turn down of her submission, because of the high cost of promotion. We would like to know perhaps what reason they gave Mr. Funke for turning down his submission. We would like to know if there were any releases and so forth, any reference made to the previous submission by Wilkin in correspondence with Funke, whether this was a contemplated matter and it may be that it will be totally irrelevant to this lawsuit, but there is enough chance that it is relevant that we think we should be permitted to examine into these documents.

I can't see that they would be prejudiced in any way by permitting this inspection at this time.

And I might add that in connection with, again, with these privileged documents, they also in "time" were close to the Funke submission. Now, I don't really think that probably, if it is privileged it is probably privileged—perhaps this is irrelevant as far as reviewing privileged documents is concerned but this is to explain our reason for these two motions.

The Court: Well, you have given me no reason to change my previous ruling with respect to those matters I ruled privileged and I will overrule that motion.

Now then, your problem about Funke, you are in effect asking for a showing of documents under Rule 34 for which

there has to be an adequate reason. You have taken the depositions of all of the people who dealt with Funke, haven't you?

Mr. Fettis: Yes.

The Court: So that you have their statements with respect to what happened. You have had the opportunity to take Funke's deposition if you need to.

Mr. Fettis: Funke is deceased, I might add. Now, I will say this: We have talked via long-distance phone with his attorney, his patent attorney I believe, and also the attorney that has handled the estate. We have sought to talk with his widow. I don't think we ever talked to her. But we have undertaken to obtain whatever information we could on that source.

I will agree that the significance of some of this should not have escaped my attention at the time of some of these depositions but, nevertheless, it did and it was only after a review of a lot of things.

The Court: Well,—

Mr. Fettis: They will be using the Funke device in this trial. We weren't aware of that at the time of this deposition.

The Court: They will be using the Funke device, is that correct?

Mr. Miller: If the Court please, it is listed as an exhibit and they went through this very matter when they took the depositions in Chicago. Mr. Jepson told them it was the Funke device. The problem I have with this is not only the showing, as you correctly point out under Rule 34, but the timing involved in it. I don't want to be in the position of trying to cover up anything but if we go into this area now we could well put off the time of trial again and I don't think, if you balance the two, it is worthwhile.

They do know and are aware and everybody was aware for a year and a half that Mr. Funke brought in a device to Sunbeam, made from production tools, because this is what they ascertained in the deposition, if in no other manner. That device was at least identified during those depositions and in Mr. Jepson's deposition. There certainly was no secret about it. It is a thing that we have all known for a year and a half that he did make such a submission in the summer of 1958

I think that at this time in the trial we ought to get at it instead of pursuing another area. I don't know where it will end is the big problem. It is just a matter of looking up a half dozen pieces of correspondence, that is right, but it depends on what you do with it and where it—

The Court: I was looking in here for the language which has been usual in pretrial orders and which is not in here.

Mr. Miller: You mean about the discovery being complete?

The Court: Yes.

Mr. Miller: I couldn't very well provide it, Judge, since they had the motion. It was complete so far as we knew up to that point.

The Court: I understand that but the balance of that statement is the one that I am talking about. That "discovery is complete except" and "that all exhibits and evidence have been disclosed except those permissible in proper rebuttal."

Mr. Miller: I was aware of Your Honor's statement.

The Court: Now, I think this properly should be covered in rebuttal, if it is useful at all, it has to be in rebuttal by the plaintiff in showing that whatever may occur in connection with it, with the Funke device, isn't it? If you are using it in your case in chief, unless you are showing a whole method or area of practice of this company and

what they do, it lacks some materiality with me, what they may have done with some other unit, but if they use it as a defense to your contention that they took your ideas, then it seems to me that rebuttal-wise it is proper and I will direct the defendant to have material available in the event it is necessary for proper rebuttal and insofar as my statements here are applicable to the pretrial order they will become a portion of the pretrial order.

Now, I don't want a "hassle" with respect to whether this is a part of the case in chief or rebuttal. I want to dispose of that now. That if it is going to be a part of the case in chief I am going to have to hear more about it. And you are going to have to be somewhat more specific with respect to what documents you want.

I agree with the defendant, as you do I know except for the interest which you must present of your client, that this is a rather late date to start investigating into the files of the defendant corporation. But if it is properly rebuttal, and I think from what you have said it is, I think you will have the right to disclose it at the proper time and, as I say, I will tell the defendant now to have their correspondence with Funke available should it be needed for rebuttal of any issue that they may put on. And I think that is as fair as I can be to both of you.

Mr. Fettis: I think that is right. I might say this: I would be surprised if there is anything in it that would really contribute to our case in chief but I don't know what they might disclose.

Of course, if we discover in looking at this that they wrote and told Mr. Funke that this idea had already been submitted to them, this would be very important to our case in chief but I am quite sure that would not appear in the correspondence. I don't think Sunbeam would be in that position probably.

The Court: Well, it could appear, it could be explainable. Nobody has developed yet a method to take away from the presentation of a case what I used to like to call the "innuendoes of innocence." And I suspect that I am more aware than any of you in my effort to see that the litigants obtain justice as distinct from counsel obtaining justice which is the responsibility that keeps the Court weighing at all times the ability of counsel with what they have to work with to present their position. And this is why the courts are sometimes accused of trying a case of one side or the other. As the fellow said, "Judge, you don't get the fee. Let me try my own case."

(Colloquy here is had off the record.)

The Court: Anyhow, with that addition, and remind me that I have made it an addition to the pretrial order if it becomes necessary.

Mr. Miller: We can prepare an order and cover it, Judge, the ruling on the privileged documents, point out that the discovery is finished except for the problem on the Funke thing. Your order is that we will have the correspondence available for you to rule on it if it is offered in rebuttal.

The Court: That is right, if it becomes necessary in proper rebuttal.

Mr. Fettis: May I ask to interpret this: If we feel in the course of the trial—I don't know whether we will or not —but if we feel that this might be pertinent for rebuttal would we be privileged to examine it at that time?

The Court: If you don't delay it, but I mean I am going to pass on it as to whether or not it is rebuttal.

Mr. Miller: Sure.

The Court: Yes, you will get to see it if it becomes necessary in proper rebuttal, if you have a specific request

for a specific item. "All correspondence relating to it." In other words, you have got to pin down, for instance, what you want.

Mr. Fettis: For instance, here is what will happen: we will ask them, as we have already, whether or not they entered into any agreement to pay anything to Funke for his submission which he made to them and which I understand they will say, "No."

The Court: All right.

Mr. Miller: That is what I told them because that is what I understand.

Mr. Fettis: Then if we ask them on what grounds they turned him down, I don't know what the answer to that will be. I assume it will be because they felt he had nothing that was novel or patentable and so forth.

The Court: Well, when they are on the witness stand you can certainly be able to inquire if they did turn them down, "Did you write a letter turning them down."

Mr. Fettis: That is what I am getting to.

The Court: Yes, I know what you are getting to. If they say, "Yes, we did," you can say, "Let me see the letter."

Mr. Fettis: That is what I want.

The Court: That isn't any problem. That is why I am having them have them here.

Mr. Fettis: That is fine.

The Court: And you better put "agreements or correspondence".

Mr. Miller: "Correspondence."

The Court: "Or agreements with Funke."

Mr. Miller: That is what I understood you meant.

The Court: Yes. And this would be on cross-examination.

Mr. Fettis: Yes, this is fine.

The Court: We are not trying to keep you from it.

Mr. Fettis: I know that.